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# **COPYRIGHT IN GOVERNMENT PUBLICATIONS: HISTORICAL BACKGROUND, JUDICIAL INTERPRETATION, AND LEGISLATIVE CLARIFICATION\***

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## **I. INTRODUCTION†**

Ever since 1895, statutory provisions have prohibited the assertion of copyright in any publication of the United States Government.<sup>1</sup> Although the interaction of the statutory provisions contained in the printing law and in the copyright law,

\* The opinions and conclusions presented in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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† As the type was being set on this article, the House of Representatives, 122 CONG. REC. H10911 (H. daily ed. 1976), passed its version of the copyright law revision. Because the Senate and House versions were not identical, the bills were referred to a conference committee which resolved the conflicts. See H.R. REP. No. 94-1733, 94th Cong., 2d Sess. 1 (1976). The Senate, 122 CONG. REC. S17256 (S. daily ed. 1976), and the House of Representatives, 122 CONG. REC. H12018 (H. daily ed. 1976), approved the conference bill and transmitted it to the President who signed it into law. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541.

In this article, the provisions denominated as "proposed" in S. 22, 94th Cong., 1st Sess. (1975), have, without exception, been enacted into law. The Act becomes fully effective on January 1, 1978. Act of Oct. 19, 1976, Pub. L. No. 94-553, §§ 301-303, 90 Stat. 2541. Under section 301(b) no rights arising under the old act prior to January 1, 1978 are affected. Consequently, over the next 14 months, we will operate under the old law, but with an eye toward the new statute.

The article predicts no legislative solution to the problem of copyright in works produced under government contract, but the Congress may take another look at the entire area. The bill originally passed by the House provided that the National Technical Information Service, a part of the Department of Commerce, could copyright a limited number of documents. That provision was eliminated from the conference bill in view of the conferees' promise that the Senate will consider the matter in 1977. 122 CONG. REC. H12017 (H. daily ed. 1976) (remarks of Mr. Kastenmeier); see H.R. REP. No. 94-1733, 94th Cong., 2d Sess. 69-70 (1976). When this subject is reconsidered, the Congress will have the opportunity to deal with the broader problem of works produced under government contract.

<sup>1</sup> The initial statutory provision was a part of the 1895 revision of the printing law. Act of June 12, 1895, ch. 23, § 52, 28 Stat. 608. A similar provision was incorporated into the copyright law during the 1909 revision. Act of Mar. 4, 1909, ch. 320, § 7, 35 Stat. 1077. The provisions have been only slightly modified since their enactment. The current provision in the printing law is 44 U.S.C. § 505 (1970) and the current copyright provision is 17 U.S.C. § 8 (1970).

and the provisions themselves raise almost as many questions as the provisions answer,<sup>2</sup> the major issue of what constitutes a publication of the United States Government has been largely settled by administrative practice,<sup>3</sup> the courts<sup>4</sup> and the interpretations of commentators.<sup>5</sup> Nonetheless, questions regarding the rights of military authors in works produced in the course of their duties still arise, and little readily available military authority is available to quickly resolve these issues.<sup>6</sup>

Three other questions of varying degrees of importance are alive in the area, although two may be neatly resolved by the Congress in the near future. The two easily resolved questions concern the common law rights of the Government in unpublished works and the ability of the Government to secure a copyright in works that are not "publications" in the sense that they are not printed documents. The third question is somewhat more complex. It is whether the prohibition against copyright in government publications should extend to materials produced under government funded grants or contracts. This issue has not been litigated in recent years and has emerged only in

<sup>2</sup> For example, what precisely is a "government publication"? See Section IV.A.1 *infra*. Does the term refer only to material that has been "published" generally? See Section IV.C *infra*. What is the precise nexus with the Government that makes such a work a government publication? See Section IV.A.2 *infra*. May the Government retain a common law copyright in an unpublished work on the ground that it is not a "publication"? See Section IV.C *infra*.

<sup>3</sup> See REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAWS (Committee Print 1961) [hereinafter cited as REPORT OF REGISTER] which states that the Copyright Office considers a government publication to be one produced by a government employee within the scope of his employment, whether or not privately printed. *Id.* at 131.

<sup>4</sup> See, e.g., Public Affairs Associates, Inc. v. Rickover, 294 F.2d 262 (D.C. Cir. 1960), *vacated*, 369 U.S. 111 (1962); Sherr v. Universal Match Corp., 297 F. Supp. 107 (S.D.N.Y. 1967), *aff'd*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970); Sherrill v. Grieves, 57 Wash. Law Rptr. 286, 20 C.O. Bull. 675 (Sup. Ct. D.C. 1929).

<sup>5</sup> H. HOWELL, COPYRIGHT LAW § 8, at 47 (Latman rev. ed. 1962); 1 M. NIMMER ON COPYRIGHT § 66, at 267 (1975).

<sup>6</sup> The principal Army regulation dealing with this subject is overbroad and probably incorrect. Army Regulation No. 27-60, Patents, Inventions, and Copyrights, para. 4-8 (15 May 1974) merely repeats the phraseology of the statute and adopts the broadest possible reading: "A Government publication is defined as a work prepared by a [government] officer or employee . . . as part of his duties." *Id.* para. 4-8a (emphasis added). The regulation goes on to include works which are prepared as part of an officer or employee's *express or implied* duties and claims a royalty-free license in any work which was created with any government time, materials or facilities, *id.* para. 4-8b (emphasis added). Another regulation merely states that "Government publications are not eligible for copyright." Army Regulation No. 310-1, Publications, Blank Forms, Printing Management, para. 1-19b (C1, 25 Sept. 1973). The Army's Legal Assistance Handbook, a remarkably thorough work, contains no discussion of the government publications problem. See U.S. DEPT OF ARMY, PAMPHLET No. 27-12, LEGAL ASSISTANCE HANDBOOK ch. 31 (1974).

the congressional hearings considering the revision of the copyright laws. The committee proceedings have provided a forum for advocates on either side of the question<sup>7</sup> and have produced little in the way of balanced commentary. Most of the presentations have ignored the historical basis for the copyright prohibition as well as two programs which have explicitly authorized copyright in government subsidized materials for several years.

This article will trace the development of the American common law and statutory prohibitions on copyright in government publications and synthesize the various reasons the courts first, and then the Congress, determined that governmental works should not be copyrighted. This discussion will illustrate situations in which the courts have found the restriction applicable and will consider some of the other problems typically associated with the publication of materials created by government authors. Using the historical and theoretical bases for the prohibition of copyright in government publications, the article will then address two questionable and probably incorrect provisions of the Army regulation; whether the Government may assert common law copyright in unpublished government materials; and whether materials produced under government contracts are the proper subject of copyright. The discussion of these issues will draw upon the published congressional hearings considering the various bills to revise the copyright law and will note proposed legislative alterations where appropriate.

## II. AMERICAN COMMON LAW ORIGINS

### A. EARLY SUPREME COURT CASES

Even before Congress enacted the first statutory prohibition of copyright in government publications, the Supreme Court, first in a casual aside, and later in a more clearly articulated holding, determined that on public policy grounds there could be no copyright in the written judicial opinions of the courts. In *Wheaton v. Peters*<sup>8</sup> the Court, after a thorough review of the British common law, the United States Constitution and

<sup>7</sup> As a general rule, book publishers and researchers have sought an exception to the statute which would permit them the opportunity to publish government sponsored material with copyright protection, and news media representatives have opposed any such exemption with equal vigor. See DISCUSSION AND COMMENTS ON THE REPORT OF THE REGISTER OF COPYRIGHTS (Committee Print Feb. 1963). There Mr. Rosenfield of the Public Affairs Press advocated strict adherence to the principles of non-copyrightability, *id.* at 203, while Mr. Frase of the American Book Publishers Council extolled the advantages of private publication and copyright. *Id.* at 204.

<sup>8</sup> 33 U.S. (8 Pet.) 591 (1834).

the early copyright act, held that after publication no common law right could serve as the basis for copyright; and that in order to obtain a copyright, compliance with the notification and delivery provisions of the statute was indispensable. Before remanding the case for trial on the issue of compliance with the act, the Court, joined by Justices Thompson and Baldwin, who had dissented on the merits, gratuitously remarked

... that the court are unanimously of the opinion that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.<sup>9</sup>

In its first attempt to elucidate the position taken in the final lines of *Wheaton v. Peters* the Court appeared to rely on three somewhat related theories, each having its basis in "public policy." The case of *Banks v. Manchester*<sup>10</sup> involved a statutory scheme whereby the reporter of the Ohio Supreme Court was to secure a copyright in that court's opinions for the benefit of the state. The Court rejected the plaintiff's contention that the reporter could obtain a copyright in the opinions, statements of the cases, syllabi or headnotes, all of which had been prepared by the judges. The first basis of the opinion stated that:

In no proper sense can the judge who [prepared all the material to be copyrighted] be regarded as their author or proprietor . . . so as to confer any title . . . on the state. . . .<sup>11</sup>

Then the Court commented that the judges

. . . receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors.<sup>12</sup>

After this statement and an incantation of *Wheaton's* name, the "public policy" basis of the decision finally emerged:

The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a Constitution or a statute.<sup>13</sup>

The result was unmistakably clear. The judges lacked the capacity to empower the reporter to obtain a copyright in their decisions. What was unclear was whether this result flowed from the judges' failure to obtain the status of "authors"; whether the judges' receipt of statutory compensation precluded them from obtaining an additional pecuniary reward; or whether judicial opinions, as expositions of the law, were

<sup>9</sup> *Id.* at 668.

<sup>10</sup> 124 U.S. 244 (1888).

<sup>11</sup> *Id.* at 253.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

simply noncopyrightable. This final consideration was in all probability the motivating rationale, because in its final sentence, the Court extended its language in *Wheaton*, which involved its own decisions, to all courts: the Justices in effect stated that no judge of any court could confer exclusive rights to his judicial labors on any person.

One month later the Court had another opportunity to clarify *Wheaton* and took the opportunity to inferentially reemphasize the final rationale of *Banks* as the basis of its decision. In *Callaghan v. Myers*,<sup>14</sup> the plaintiff was the assignee of the reporter of the Supreme Court of Illinois who had prepared considerable original material and appended it to the opinions of the court. The defendant, who had been sued for infringing the assignee's copyright, contended that the reports were public property and therefore not susceptible of private ownership. Myers also alleged that the reporter was not an author within the meaning of the copyright act. The Court, relying on what was *not* stated in *Wheaton*, concluded that the Court must have determined that Wheaton could have obtained a copyright in the materials which he appended to the Supreme Court's opinions. Had this not been the case, there would have been no cause to return the case for trial on the issue of compliance with statutory prerequisites. Further, the Court found the reporter to be an author under the statute and despite his public position and salary, found him to be capable of obtaining copyright in his additions to judicial opinions absent any explicit inhibition. Clearly then, the Court read *Wheaton* and *Banks* as having precluded the assertion of property rights in judicial opinions on the basis that the law cannot become the property of any one individual. It excluded the "author" and "compensation" bases of the *Banks* opinion and relied upon it for the proposition that "there can be no copyright . . . in the opinions of the judges, or in the work done by them in their official capacity as judges . . ." <sup>15</sup> presumably because the freest access to such works should be encouraged.

This theory of the Court's *ratio decidendi* has not been universally accepted by the commentators who have discussed the issue. While Howell strenuously questions whether any copyright can subsist in judicial reports,<sup>16</sup> Nimmer seems to view the double compensation rationale as a persuasive basis for disabling government employees from obtaining copyright in materials produced within the scope of their employment:

<sup>14</sup> 128 U.S. 617 (1888).

<sup>15</sup> *Id.* at 647.

<sup>16</sup> H. HOWELL, COPYRIGHT LAW 205 (Latman rev. ed. 1962).

[S]omewhat anomalously the older decisions have held that an official reporter *paid by the state* may personally claim copyright in the headnotes and synopses . . . written as a *part of his official duties*, in the absence of an agreement to the contrary.<sup>17</sup>

Nimmer continues by stating that this exception for reporters who were paid government employees may be explained on the basis of "a time honored usage."<sup>18</sup> Indeed, such an argument has a substantial persuasiveness to it. The fact that reporters of court decisions may copyright material they prepare in the scope of their duties probably is a result of the Court's failure to squarely face the question of the copyrightability of a government employee's work in *Wheaton v. Peters*. Between *Wheaton* and the two 1888 decisions, *Banks* and *Callaghan*, lower courts had commented upon the Supreme Court's inferential ruling that Wheaton was entitled to copyright his additions to the *Supreme Court Reports*<sup>19</sup> and an influential commentator thought the question of copyright in the reporter's notes, and even in the decisions themselves, was easily answered in the affirmative.<sup>20</sup> The question of the ability of the reporter to copyright his additions to the reports not having been litigated, the Court may have failed to realize the full implications of its remand of the case to the circuit court.

Nonetheless, by 1890 there appeared to be either an exception to the general allowability of copyright for expositions of the law; a presumption which prohibited copyright by government employees of material created in the scope of their employment with an anomalous exception for reporters of judicial opinions; or, most likely, a general prohibition of copyright in materials which constituted "the law" and a presumption, that absent express language or firm tradition to the contrary, publications of government employees could not be copyrighted because they belonged to the writer's employer—the public at large.

#### *B. LOWER COURT DECISIONS AND ADMINISTRATIVE OPINION*

Even before the first statutory restriction on copyright in government publications emerged in 1895, the general practice, if

<sup>17</sup> 1 M. NIMMER ON COPYRIGHT LAW § 66, at 269 (1975) (emphasis added).

<sup>18</sup> *Id.*

<sup>19</sup> *Little v. Gould*, 15 F. Cas. 612 (No. 8395) (C.C.N.D.N.Y. 1852); *Gray v. Russell*, 10 F. Cas. 1035 (No. 5728) (C.C.D. Mass. 1839).

<sup>20</sup> E. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 161 (1879) [hereinafter cited as DRONE]. Drone contended that judicial decisions "are a proper subject of copyright." *Id.*

we can believe a contemporary source, was to publish government printed material without complying with the formalities for obtaining a copyright.<sup>21</sup> Indeed, the public at large, or at least litigants challenging another's right to property in a document that had some connection with the Government, frequently alleged or assumed that all public documents were in the public domain.

The practical ramifications of the government's failure to properly claim copyright emerge in bits and pieces from occasional reports of judicial and legislative consideration of the copyright issue. In *Blunt v. Patten*<sup>22</sup> the defendant claimed he had not infringed the plaintiff's copyright in a map because he had merely copied a public document, which anyone was free to do. The decision is not clear whether Patten claimed the map was public merely because the author had transmitted a copy to the Navy Department for government use and preservation in the public archives, or because the Navy had provided assistance in the preparation of the map. The chart was prepared by the plaintiff and his crew, although the commander of a naval station had permitted the use of a naval vessel in making the survey in question. The government assistance was given with the express understanding that the results of the work were to be for the plaintiff's private benefit. The circuit judge concluded:

. . . [T]he pretense that it became a public document from being deposited in a public office, was entirely untenable. The survey was made chiefly at the plaintiff's expense, and according to the understanding, it was to be for his benefit; it was of great use to the navigating community, and Capt. Hull was justified in aiding him in it upon such terms.<sup>23</sup>

A more direct relationship with the Government mandated a different result in *Heine v. Appleton*.<sup>24</sup> There the plaintiff attempted to assert his copyright on drawings which he had made while employed by the Government during Commodore Perry's expedition to Japan. After Congress had ordered Perry's report of his journey published, the plaintiff sued to enjoin publication of a subsequent edition. His motion was quickly denied because he could not qualify as an "author" for the purpose of the statute because his

sketches and drawings were made for the government, to be at their disposal; and Congress, by ordering the report, which contained those sketches and

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<sup>21</sup> *Id.* at 164. Drone indicates that this practice was the result of inaction, rather than any lack of capacity to obtain a copyright. *Id.*

<sup>22</sup> 3 F. Cas. 762 (No. 1579) (C.C.S.D.N.Y. 1828).

<sup>23</sup> *Id.* at 763.

<sup>24</sup> 11 F. Cas. 1031 (No. 6324) (C.C.S.D.N.Y. 1857).

drawings, to be published for the benefit of the public at large, has thereby given them to the public.<sup>25</sup>

An opinion of The Judge Advocate General rendered in 1897 illuminates the administrative interpretation given to the Supreme Court precedents during this same period.<sup>26</sup> The facts giving rise to the opinion involved an Army officer's assertion of copyright in a published course of rifle and carbine instruction which he had prepared under orders from competent authority. When other officers revised the work several years later, they questioned the propriety of republishing the material in view of the original author's copyright. The opinion concluded that the facts that the first author had prepared the instructions "in his official capacity, . . . in the performance of his duty . . . and under [his government] salary" were sufficient grounds to hold "the copy right [sic] was not a valid one." However, after this clear articulation that the nature of the officer's duties precluded him from obtaining a valid copyright, The Judge Advocate General brought his decision into line with *Wheaton v. Peters* by stating:

[T]he regulations as originally prepared, considered, revised and adopted became the official public regulations for rifle and carbine firing in the army, and that therefore they could, as again revised by other officers in their official capacity, be printed by the Government for distribution to the army, without infringement of the copyright referred to.<sup>27</sup>

This phraseology appears to undercut the prior basis of the decision by seeming to concede the validity of the author's copyright, even though the copyright could not bar the Army from utilizing the work. One theory that might justify this position is the implicit assumption that even if a copyright did exist, it be-

<sup>25</sup> *Id.* at 1033; *accord*, DIG. OPS. JAG 1901 *Copyright*, para. 969, at 277 (1891). In that 1891 opinion The Judge Advocate General considered the effect of a retired officer's assertion of copyright in an abridgement of the "Infantry Drill Regulations." This publication had been printed by the Public Printer who had then sold a set of duplicate electrotype plates to the abridger. See Section III.A *infra*. The opinion belittled the abridgement, terming it the "so-called 'Abridgement'—substantially the original work somewhat reduced" and held the act of "attempted copyrighted . . . wholly nugatory at law." The basis of the opinion was that the retired officer's efforts could not confer upon him the status of an author for the purposes of the statute. See also DIG. OPS. JAG 1912 *Copyright*, para. I, at 388.

In an interesting sequel to this case, The Judge Advocate General held that:

Assuming (by an Officer) to copyright as owner, and thus asserting the exclusive right to publish, in an abridged form, the Infantry Drill Regulations, property of the United States, and the formal official publication of which had already been announced in orders by the Secretary of War . . .

was properly chargeable under the Articles of War as a disorder or neglect to the prejudice of good order and military discipline. DIG. OPS. JAG 1912 *Articles of War*, para. LXII D, at 149-50 (1893).

<sup>26</sup> DIG. OPS. JAG 1901 *Copyright*, para. 971, at 277-78 (1897).

<sup>27</sup> *Id.* at 278 (emphasis added).

longed to the Government by virtue of the fact that it was obtained by an employee for work created within the scope of his duties.<sup>28</sup>

The factual situations in *Blunt* and *Heine* are so different that meaningful conclusions of other than the broadest type are difficult to substantiate, and the JAG opinion seems to adopt theories compatible with both. It is, at this point, unclear whether public documents other than expositions of the law were as a matter of principle debarred from copyright protection or whether publication without compliance with the statutory formalities forfeited otherwise allowable protection. The defendant in *Blunt* urged the former construction, while the language in *Heine* and the JAG opinion can be read to support the latter view.

The last pre-statute case sheds little more light on the question of copyright in government publications than did the earlier cases. *Hanson v. Jaccard Jewelry Co.*<sup>29</sup> merely held that a compilation of materials drawn from public documents could be copyrighted. The basis of the decision was that "such publications are valuable sources of information and require labor, care and some skill in their publication."<sup>30</sup> As with most of these pre-statute materials, the noncopyrightability of government published works is implicit in the court's opinion, but no reason for the restriction is stated.

These events comprise the available sources of information on the practice and opinion concerning copyright in government publications prior to the enactment of the first statutory proscription in 1895. The events noted above, and the uncertainty of the rules respecting copyright in governmental publications would not in all probability have provoked legislation to regularize the status of property rights in governmental publications<sup>31</sup> had it not been for the Richardson Affair. This particular interlude in congressional history has been thoroughly

<sup>28</sup> This theory is made all the more plausible by the fact that the original copyright had been granted before any statutory proscription on copyright in government publications had been enacted. Thus the Government would argue that the copyright should vest in it on a "works for hire" theory.

<sup>29</sup> 32 F. 202 (C.C.E.D. Mo. 1887).

<sup>30</sup> *Id.* at 203. *Contra*, DIG. OPS. JAG 1901 *Copyright*, para. 970, at 277 (1890):

Where an official of the War Department was allowed to compile and publish facts derived from records, the property of the United States, preserved in that Department for official and public use and reference, *held* that he could not legally copyright in his own name such compilation.

<sup>31</sup> During this period there is little evidence that Congress either saw the need to deal directly with the question of copyright in government publications or considered the reasons behind the administrative practice which avoided copyrighting government documents. Congress did enact two relief bills which issued duplicate printing plates and permitted copyright in materials previously printed by order of Congress. Act of May 24, 1866, ch. 99, 14 Stat. 587; Act of Jan. 25, 1859, ch. 16, 11 Stat. 557.

treated elsewhere<sup>32</sup> and will be noted here only to the extent necessary to illuminate the considerations that found their expression in the first congressional prohibition of copyright in governmental documents.

### III. STATUTORY PROHIBITIONS ON COPYRIGHT IN GOVERNMENT PUBLICATIONS

#### A. THE 1895 PRINTING LAW

An 1894 Joint Resolution delegated to the Joint Committee on Printing the task of publishing a collection of presidential communications including messages, addresses and proclamations.<sup>33</sup> Unfortunately, no provision appropriated the funds necessary for prepublication collection and editorial work. Congressman Richardson, Chairman of the Committee, volunteered his services, spent considerable time and effort in the process, and sought and received compensation in the form of a set of duplicate plates from the Public Printer. The year before, Richardson himself had developed a bill which included a provision allowing the sale of duplicate plates to the public.<sup>34</sup> To preclude the assertion of copyright by users of these plates, a restriction on copyright in reprints of government publications was inserted<sup>35</sup> and then the general prohibition on copyright in government publications was added.<sup>36</sup> Richardson took out

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The first bill authorized the conveyance of duplicate plates to a work entitled *History, Statistics, Condition, and Prospects of the Indian Tribes of the United States* to the widow of the author, Henry R. Schoolcraft. The only concern shown in the debate on the floor of Congress was whether the plates were of any value to the Government. Upon assurance that the plates held no value to anyone the Congress passed the bill. CONG. GLOBE, 35th Cong., 2d Sess. 511, 517 (1859). The 1866 Act permitted the widow of Naval Lieutenant William L. Herndon to reprint his book *Exploration of the Valley of the Amazon* which had been ordered published by the Congress after Lt. Herndon's return from the Amazon. H.R. EXEC. DOC. NO. 53, 33d Cong., 1st Sess. (1854). This bill was passed after somewhat more searching inquiry, probably because someone had questioned the right of the Government to award the earlier copyright to Mrs. Schoolcraft. See CONG. GLOBE, 39th Cong., 1st Sess. 2738 (1866).

Despite the publication by order of the Congress, in 1851, a second, private edition of Schoolcraft's work was printed, bearing a copyright notice in the name of the publisher. The validity of this copyright, whether asserted on a work printed from duplicate government plates or not, appears to never have been questioned judicially.

<sup>32</sup> Berger, *Copyright in Government Publications*, STUDY NO. 33 PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86th Cong., 2d Sess. 29-30 (Committee Print 1961) [hereinafter cited as Berger]; Stiefel, *Piracy in High Places—Government Publications and Copyright Law*, ASCAP COPYRIGHT LAW SYMPOSIUM NO. 8, at 21-26 (1957).

<sup>33</sup> See 26 CONG. REC. 7952 (1894).

<sup>34</sup> See 25 CONG. REC. 1452-57 (1893).

<sup>35</sup> Id. at 1765.

<sup>36</sup> Id. at 1766-67 (comments of Mr. Dingley).

a copyright on his editions, and although he claimed that he did not assert his copyright as against the Government<sup>37</sup> and that his editorial work added original material to the editions, a Senate committee later found that Richardson should never have obtained a copyright on those materials.<sup>38</sup> This finding was based on the considerations that the work as a whole had been commissioned by Congress and more specifically that:

If the services of any author or compiler employed by the Government require to be compensated, payment should be made in money frankly and properly appropriated for that purpose, and the resulting book or other publication in whole and as to any part should be always at the free use of the people, and this, without doubt, was what Congress intended.<sup>39</sup>

This statement, while clarifying the Richardson case, began the confusion which to some extent still exists concerning the definition of "Government publications."<sup>40</sup> The Superintendent of Documents, for his purposes, defined the term as publications reproduced and disseminated under the auspices of the Government.<sup>41</sup> The Attorney General echoed this interpretation.<sup>42</sup> This definition, however, ignores the problems generated when government sponsored or federal works are not officially printed by the Government.

Another example of the narrow coverage of the 1895 Act was germinating even as the printing law was being debated. As a section of the printing law, the bill could obviously hope to control only *printed* material and not other works subject to copyright. In *Dielman v. White*<sup>43</sup> the plaintiff had been commissioned by the Library of Congress to create a mosaic for a wall of the Library. He submitted his cartoon, complete with notice of copyright, for approval; and after the contract administrator had approved the design, the mosaic was fashioned and hung, always bearing the statutory notice. When the artist subsequently objected to the publication of unauthorized photographs of his work, the court dismissed his bill. Relying on the normal patron-artist principle that the patron would obtain copyright in any work he commissioned absent agreement to the contrary, the judge dismissed the parties' citation of *Banks*,

<sup>37</sup> See 25 CONG. REC. 1766 (1893). See also Stiefel, *supra* note 32, at 22 n.61.

<sup>38</sup> INVESTIGATION RELATING TO MESSAGES AND PAPERS OF THE PRESIDENTS, S. REP. NO. 1473, 58th Cong., 1st Sess. 2 (1900).

<sup>39</sup> *Id.*

<sup>40</sup> As finally enacted, the statute provided "That no publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted." Act of June 12, 1895, ch. 23, § 52, 28 Stat. 608.

<sup>41</sup> See Stiefel, *supra* note 32, at 26.

<sup>42</sup> 27 OP. ATT'Y GEN. 288 (1909); 18 OP. ATT'Y GEN. 51 (1884).

<sup>43</sup> 102 F. 892 (C.C.D. Mass. 1900).

*Callaghan* and government-related patent cases as "remote," and found that "considering . . . the habits of governmental officers"<sup>44</sup> the evidence of acquiescence was not sufficient to overcome the presumption of copyright vesting in the patron.

The failure of the court to make mention of the newly enacted prohibition of copyright is not surprising in light of its emergence in the printing act and its reference to "publications" or "reprints."<sup>45</sup> Indeed, this interpretation of the decision has been followed in a recent case.<sup>46</sup> More surprising, however, is the absence of any concern over the origination of and payment for the project by the Government. Nowhere did the court make any mention of the dual compensation or public domain arguments which served to justify the common law prohibition of copyright in government publications.

### B. THE COPYRIGHT ACT

The statutory provision was substantially incorporated into the copyright law in the hurried passage<sup>47</sup> of the 1909 revision,<sup>48</sup> and the courts, with some exceptions, began to go beyond the mere face of the statute and elaborated on the reasons for the prohibition. One case noted that a document's "public character"<sup>49</sup> excluded it from copyright protection. This "character" must have attached as a result of the article's publication as an official document by the U.S. Bureau of Education; the court noted in dictum that the author was not herself disabled from asserting her copyright in the article prior to its publication without statutory formalities.

### C. JUDICIAL INTERPRETATION OF THE ACTS

This theory of the prohibition was further developed in *Sherrill v. Grieves*,<sup>50</sup> a case involving a government officer

<sup>44</sup> *Id.* at 894-95.

<sup>45</sup> See note 40 *supra*.

<sup>46</sup> *Sherr v. Universal Match Corp.*, 297 F. Supp. 107 (S.D.N.Y. 1967), *aff'd*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 396 (1970). *See also* section IV.A.1 *infra*.

<sup>47</sup> The Congress had apparently not anticipated that the Senate and House committees would both take favorable action on the bill. When both committees unanimously reported the bill favorably, 43 CONG. REC. 3765 (1909), the House, *id.* at 3769, and the Senate, *id.* at 3747, passed the bill. The hearings indicate that there was no attempt to broaden the Printing Act's provisions in the enactment of the copyright bill. *See Arguments on S. 6330 and H.R. 19853 Before the Comm. on Patents of the Senate and House of Representatives, Conjointly*, 59th Cong., 1st Sess. 133 (1906) [hereinafter cited as 1906 Copyright Hearings].

<sup>48</sup> The original copyright provision read: ". . . [N]o copyright shall subsist in the original text of any work which is in the public domain, . . . or in any publication of the United States Government." Act of Mar. 4, 1909, ch. 320, § 7, 35 Stat. 1077.

<sup>49</sup> *Du Puy v. Post Telegram Co.*, 310 F. 883, 884 (3d Cir. 1914).

<sup>50</sup> 57 Wash. L. Rptr. 286, 20 C.O. Bull. 675 (Sup. Ct. D.C. 1929).

whose writings were initially printed at government expense. While willing to concede that such publication may have made the pamphlet a government publication "in the mere physical sense,"<sup>51</sup> the court was unwilling to conclude that the physical act of printing by the Government was sufficient to invoke the restriction of the statute.

In *Sherrill*, the plaintiff was an Army officer, teaching advanced courses in map reading, topography and surveying at the Command and General Staff College. In his leisure time, he worked on his book, which was produced for, and was in fact used in civilian institutions, as well as by his military audience. When the author sued Grieves for infringing his copyright, both parties to the litigation agreed that the plaintiff was under no duty to reduce his lectures to writing, but nevertheless the defendant urged that:

The denial of copyright to any publication of the Government or to any reprint of the whole or a part thereof has the strongest public equity as its base. In all such cases the public has paid the cost of publication and, presumably in all, has also paid the cost of producing the subject matter by salary or other compensation to those who have created or prepared the matter for publication.<sup>52</sup>

To accept such an argument would be to affirm the proposition that

by entering the employment of the Government a person sells all his energies, physical and mental, to the Government if they relate to any subject matter dealt with by him in performing his duties.<sup>53</sup>

This the court refused to do, basing its conclusion on the fact that military officers do in fact write books that have been copyrighted and used in government schools and on the early Supreme Court holdings that court reporters may copyright their "original" additions to the opinions.

Even though the court off-handedly cited the Supreme Court's decisions without considering the anomaly that the Re-

<sup>51</sup> *Id.* at 290-91, 20 C.O. Bull. at 688.

<sup>52</sup> *Id.* at 290, 20 C.O. Bull. at 687.

<sup>53</sup> *Id.* at 290, 20 C.O. Bull. at 687; *accord*, SPJGP 1942/5928, Dec. 17, 1942, 1 BULL.

JAG 375:

A work created by an officer or enlisted man in the course of his official duties, but not by virtue of a specific assignment to create such work, belongs to the author thereof. The rights of the Government to a work produced by an officer or enlisted man does [sic] not depend upon the production of such work during or outside or [sic of?] office hours, but upon the nature of the service in which the officer or enlisted man is engaged at the time the work is produced. What has been said in regard to a "work" applies, of course, to music and lyrics. . . . When copyrightable material has been created by officers or enlisted men, not specifically assigned to the production of such work, it belongs to the officer or enlisted man, and may not be used by Public Relations Officers, or reproduced on sustaining or commercially sponsored shows or broadcasts under the direction of the Bureau of Public Relations without the consent of the owner.

*Contra*, AR 27-60, para. 4-8b. See note 6 *supra* & text accompanying notes 118-124 *infra*.

porter was permitted to assert copyright in material that he prepared in the course of his duties, it seemed to base its decision on the fact that Sherrill produced the materials in addition to the duties he was contractually obligated to perform. Furthermore, the court concluded that there was nothing financially improper in the arrangement inasmuch as the Government made a deal that was obviously to its advantage.

Ostensibly using the same test, the Federal District Court for the Southern District of New York held that an employee was not entitled to damages for the infringement of a map he had created while in Alaska on government business:<sup>54</sup>

. . . [W]hen an employee creates something in connection with his duties under his employment, the thing created is the property of the employer and any copyright obtained thereon by the employee is deemed held in trust for the employer.<sup>55</sup>

The court found the requisite nexus between the plaintiff's work and the publication in the fact that the map would promote interest in Alaska and therefore that the publication of the map "relates directly to the subject matter of the plaintiff's work."<sup>56</sup> Even though the required relationship between the scope of employment and the literary product is much more distant here, and the "connection with" test is much broader than others used, it is worthy of note that the court felt the need to protect taxpayer dollars and prevent double compensation: there was "no evidence that this was not done on government time";<sup>57</sup> and a subordinate government employee as well as government facilities had been utilized in the project.

The rationale of the *Sawyer* case has been criticized<sup>58</sup> and was not followed in the series of cases resolving Vice Admiral Hyman Rickover's right to copyright certain speeches given by him,<sup>59</sup> some of which related to his duties as a naval officer. Because the speeches were the outgrowth of Rickover's government activities, were in part prepared on what the plaintiff alleged was "government time" and were produced with the assistance of government facilities, the plaintiff deemed that they were in the public domain, free of copyright.<sup>60</sup>

<sup>54</sup> *Sawyer v. Crowell Publishing Co.*, 46 F. Supp. 471 (S.D.N.Y. 1942).

<sup>55</sup> *Id.* at 473.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Gunnels, *Copyright Protection for Writers Employed by the Federal Government*, ASCAP COPYRIGHT LAW SYMPOSIUM No. 11, at 149-54 (1960).

<sup>59</sup> *Public Affairs Associates, Inc. v. Rickover*, 117 F. Supp. 601 (D.D.C. 1959), *rev'd*, 284 F.2d 262 (D.C. Cir. 1960), *vacated*, 369 U.S. 111 (1962), *opinion on remand*, 268 F. Supp. 444 (D.D.C. 1967).

<sup>60</sup> See the statement of facts as recited by the district court, 177 F. Supp. at 602-03.

The district court, using language reminiscent of *Sherrill v. Grieves*, divided publications emanating from government officers or employees into three categories: first, where the individual is hired to write for the government as part of his official duties; second, where the writing has no connection whatever with the individual's duties; and third, a class of writings somewhere between the first two. In this group are those works which "have some bearing on, or that arise out of . . . official actions"<sup>61</sup> although their preparation is not part of the person's official duties. The district court relied on the public interest in fostering the intellectual growth of government employees to the exclusion of "minor considerations" such as the facts that the work might have been prepared during office hours or with the assistance of government facilities or personnel. The court added that abuse of government facilities could be controlled by administrative regulations,<sup>62</sup> and noted that several of the nation's more valuable literary creations have been produced by individuals on the government payroll. After deciding the publication issue<sup>63</sup> in the Admiral's favor, Judge Holtzoff dismissed the plaintiff's complaint for a declaratory judgment on the merits.<sup>64</sup>

On appeal to the District of Columbia Circuit, the plaintiff reiterated its reading of section 8. Mr. Justice Reed, sitting by designation, declined to accept the proposition that a government official who speaks or writes on matters with which he is concerned as an official is by virtue of his official status barred from asserting a copyright in such materials. Instead, he found that none of the speeches was a government publication.<sup>65</sup> In the process of reaching this decision the court interpreted the statutory prohibition as having been enacted to promote the

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All the courts which considered the issue decided that the speeches in issue were not "government publications." The circuit court differed on the issue of whether there had been a general publication of the speeches which invalidated any subsequent copyright. 284 F.2d at 269-72.

<sup>61</sup> 177 F. Supp. at 604.

<sup>62</sup> See, e.g., Army Regulation No. 360-5, Public Information Policies, para. 4-3b (24 Oct. 1975) [hereinafter cited as AR 360-5]: "Personal literary or public speaking efforts may not be conducted during normal working hours or accomplished with the use of Army facilities, personnel or property."

<sup>63</sup> The plaintiff alleged that the speeches had been dedicated to the public by Admiral Rickover's distribution or acquiescence in the distribution of several copies which did not bear any notice of copyright. The court, reaffirming the doctrine of limited publication, see *Werckmeister v. American Lithographic Co.*, 134 F. 321 (2d Cir. 1904), held that the distribution of a limited number of copies for a limited purpose did not amount to an abandonment of the literary property in the work or bar the subsequent assertion of copyright. 177 F. Supp. at 606.

<sup>64</sup> 177 F. Supp. at 607.

<sup>65</sup> 284 F.2d at 269.

"broadest publicity for matters of government" and limited the term "government publication" to encompass only material "commissioned or printed at the cost and direction of the United States,"<sup>66</sup> in other words "authorized expositions on matters of governmental interest by governmental authority."<sup>67</sup> After this discourse the circuit court looked to officials' conduct and judicial opinions to confirm this finding. However, the court reversed and remanded the case for further proceedings on the issue of publication without notice of copyright.<sup>68</sup>

In a per curiam opinion the Supreme Court vacated the court of appeals' decision and returned the case to the district court because, in light of the importance of the decision, the "record was woefully lacking."<sup>69</sup> Consequently, the Court refused to exercise its discretion and render a declaratory judgment. Among the matters the Court deemed important for a complete presentation of the question were the following:

... [T]he circumstances of the preparation and of the delivery of the speeches in controversy in relation to the Vice Admiral's official duties. The nature and scope of his duties. . . , the use by him of government facilities and government personnel in the preparation of these speeches . . . [and] administrative practice, insofar as it may relevantly shed light....<sup>70</sup>

Like the lower courts, the Supreme Court was concerned with the scope of Rickover's duties, the use of government facilities and personnel, and the administrative practice pertaining to (it must be assumed) other government authors. Siding with past authorities, the Court was apparently concerned that property belonging to the Government was being appropriated to private use and that the use of government facilities could have a bearing upon whether a particular item was a publication of the United States Government.<sup>71</sup>

#### D. RATIONALES FOR THE PROHIBITION

The prohibition of copyright in government documents has been justified on a number of bases. The early judicial decisions relied on the policy that expositions of the law could not belong to any one person and that absent express agreement or long-standing tradition, works of government employees created in

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<sup>66</sup> *Id.* at 268. The court relied on the provisions of the 1895 Act as the source of this statement.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 272.

<sup>69</sup> 369 U.S. at 113.

<sup>70</sup> *Id.*

<sup>71</sup> Cf. Nixon v. Sampson, 389 F. Supp. 107, 133-35 (D.D.C. 1975) which considered the extent of President Nixon's property rights in the presidential materials and tape recorded conversations generated during his administration.

their official capacity could not be copyrighted because the works belonged to the employer, the public at large. This common law basis was reflected by text writers, through administrative practice and in judicial decisions.

In the commotion surrounding the Richardson Affair, legislation was passed to prohibit copyright in any publication of the Government, ostensibly any material printed by the Government through its official printing facilities. The congressional debates reflect that the Congress' purpose was to make public documents more readily available to the public at large,<sup>72</sup> a rationale similar to the reasons underlying the common law proscription of copyright in the sources comprising the law, statutes,<sup>73</sup> judicial decisions,<sup>74</sup> and eventually legislative history.<sup>75</sup> As a *post hoc* rationale, a Senate committee articulated the theory that there should be no "hidden" benefits involved in the production of government documents. Money should be frankly appropriated to cover the services of all compilers and authors, and the public should not pay twice, once through taxes, and a second time to the author for his copyright royalties.

The first appearance of the prohibition in the copyright laws came with no floor discussion of the issue. At only one point during the lengthy hearings did the question arise, and there the testimony indicated that the law was "perfectly well settled"<sup>76</sup> and needed no more explicit enumeration. Unfortunately, if this clarity existed then, it did not continue. Not only did the absence of a definition of the operative term itself pose problems, but as in the past, the courts affixed their decisions to any rationale for the prohibition which suited their purposes. When a court desired to uphold a government employee's copyright, it would merely claim that an individual does not sell his entire being to his employer when he assumes his position. Where copyright was denied, courts focused on a document's "public character," or the fact that public funds were either directly or indirectly involved in the publication of the document.

<sup>72</sup> The insertion of the provision allowing the Public Printer to sell duplicate plates to anyone who desired them "... would aid the circulation of knowledge without any detriment to the public service or any extra charge to the Government." 25 CONG. REC. 1457 (1893) (remarks of Mr. Richardson).

<sup>73</sup> *E.g.*, Davidson v. Wheelock, 27 F. 61 (C.C.D. Minn. 1866).

<sup>74</sup> *Id.*; Connecticut v. Gould, 34 F. 319 (C.C.N.D.N.Y. 1888).

<sup>75</sup> See the Act of June 20, 1878, ch. 357, 20 Stat. 207 which authorized the purchase of the plates and back issues of the *Congressional Globe* and also required the purchase of the copyright on those issues. While the copyright would vest in the Government, it cleared the way for uncopyrighted publication of the legislative history in the *Congressional Record*.

<sup>76</sup> 1906 Copyright Hearings, *supra* note 47, at 133.

In summary, then, copyright in "government publications" has been denied because:

1. In a democracy where the widest possible public dissemination of materials of public interest is considered vital:
  - a. expositions of the law (statutes, judicial opinions and legislative histories) cannot be copyrighted because everyone is presumed to know the law and no one can be given a monopoly on publishing these expositions.
  - b. materials generated by government employees and initially printed by the government should be given the widest, least expensive distribution, which is possible only if no one can monopolize the publication or republication of an item.
2. The Government should frankly recognize and openly appropriate the money to cover the cost of its public documents; and the public should not have to pay twice, once through appropriations and then again through royalties.
3. Employees cannot claim property in their work because it belongs to their employer, the public at large, and should therefore be in the public domain.
4. Government employees cannot be compensated twice for material produced in the scope of their official duties. Their only source of compensation can be their employer.<sup>77</sup>
5. Government facilities may not be used for private gain; any such use will result in the forfeiture of the rights to any property so produced.<sup>78</sup>

#### IV. ACTUAL PRACTICE UNDER THE STATUTE

Despite the general acceptance of the proposition that for the purposes of section 8 of title 17 a "publication of the United States Government" is a work produced by a government employee within the scope of his employment, whether or not privately printed,<sup>79</sup> the transformation of this principle into

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<sup>77</sup> Statutes and regulations provide that an officer of the Government may not receive additional money "or compensation for his services." 18 U.S.C. § 209(a) (1970). This statute is implemented by regulation, Army Reg. No. 600-50, Standards of Conduct for Department of the Army Personnel, para. 3-1b (6 Mar. 1972). With regard to literary efforts, individuals "will not . . . [r]eceive pay (including honorariums) for speeches or literary efforts provided as part of their official and normal duties." AR 360-5, para. 4-3g. *See also* 49 COMP. GEN. 819 (1970); 37 COMP. GEN. 29 (1957).

<sup>78</sup> This last basis rests on the decision in *Sawyer v. Crowell Publishing Co.* The decision is unpersuasive and has been criticized, *see* text accompanying notes 54-58 *supra*, and was not followed in the *Rickover* cases. The Army, by regulation, prohibits the use of government facilities for private gain. AR 360-5, para. 4-3b.

<sup>79</sup> REPORT OF REGISTER, *supra* note 3, at 131. This definition will be substantially reenacted if the proposed revision of the copyright laws is enacted into law. *See* S. 22,

administrative practice has not been consistent with the judicial interpretation of the statute. If the approach of the Department of the Army can be used as an example, it demonstrates the problems which arise when administrative regulations attempt to control employee conduct through the use of the copyright laws. Although some of the regulatory provisions are consistent with the *purposes* of the copyright provision, they do considerable violence to the terms of the statute and ignore its history.

Other problems crop up when governmental agencies, including the Army, wish to avoid the terms or the intent of the statute. In some instances these agencies have blatantly violated both the letter and the judicial interpretation of the statute by claiming (or authorizing employee-authors to claim) copyright in publications which were prepared as part of their official duties, and which have on occasion even been printed by the Government Printing Office. Another issue is whether the Government can assert a common law copyright in material and thereby prevent its dissemination. Finally, the practice of avoiding the spirit of the statute by paying nonemployee contractors or grantees to create government works and then permitting such authors to copyright their works should be examined.

#### A. *INTERPRETATION OF THE COPYRIGHT LAW IN ARMY REGULATIONS*

Army regulations have adopted a reading of the prohibition of copyright in governmental publications which is broader in language and application than the judicial decisions which have interpreted the statute in at least two particulars. The first of these provisions transforms the statutory term "publication" into the broader term "work."<sup>80</sup> The second regulatory provision interprets the statute as prohibiting private copyright in any work prepared by an employee even as part of his "implied" duties.<sup>81</sup> This interpretation, if not inaccurate, pushes the provision to its outer limits and without further clarification is misleading. A third portion of the regulation, which purports to give the Government a royalty-free license to utilize a validly

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94th Cong., 1st Sess. § 105 (1975). See also S. REP. No. 94-473, 94th Cong., 1st Sess. 56 (1975). The Senate approved S. 22 on February 19, 1976. 122 CONG. REC. S2047 (S. daily ed. 1976).

<sup>80</sup> "A Government publication is defined as a work prepared by an officer or employee of the US Government as part of his duties." AR 27-60, para. 4-8a. See also *id.* para. 4-8b.

<sup>81</sup> "Any publication or other copyrightable work which is prepared by an employee as part of his duties, either express or implied, is owned by the Government and no copyright may be obtained thereon." *Id.* para. 4-8b(1).

copyrighted work which was created with the use of any governmental facilities,<sup>82</sup> derives not from the copyright law itself but rather from a jurisdictional provision of the *United States Code*, and should be examined.

1. *"Any publication or other copyrightable work...."*

The use of the word "publication" in section 8 has provoked difficulties in discerning the section's true meaning. The use of a term so directly and exclusively applicable to printed media may leave classes of copyrightable but nonprinted works outside the coverage of the statute. Indeed, there is persuasive historical and judicial support for this interpretation of the statute.

Initially included in the 1895 Printing Act, the prohibition on copyright in government publications must be read in light of the Richardson Affair.<sup>83</sup> There, it will be remembered, Congressman Richardson obtained a duplicate set of the printing plates which had been used to print a congressionally funded compilation of the messages of the Presidents. Richardson then printed his own edition with the plates and claimed copyright in his version. Although Richardson obtained his electrotype plates by gift rather than under the statute which permitted the purchase of such plates, the Congress had only one year earlier prohibited the assertion of copyright not only in materials produced from duplicate plates but also in any "Government publication."<sup>84</sup> When a congressional committee reviewed the Richardson affair it found that this type situation was precisely what the Congress had intended to prohibit. Because this provision was first enacted in a printing statute, the reach of the original statute can only have extended to materials printed by direction of the Government. When a variant on the statutory language was incorporated into the copyright law, the drafters considered their action as merely having perpetuated settled law.<sup>85</sup> Thus, the origin of the provision supports the proposition that the term "publication" was intended to mean a document printed by order of the Government.

<sup>82</sup> If a copyrightable work is prepared by an employee not as part of his duties, he may obtain and own the copyright thereon. However, if the preparation of such work involves the use of any Government time, material or facilities, the Government is entitled to a royalty-free license to duplicate and use the copyrighted work and to have others do so for its benefit.

*Id.* para. 4-8b(2).

<sup>83</sup> See Section III.A. *supra*.

<sup>84</sup> Act of Jan. 12, 1895, ch. 23, § 52, 28 Stat. 608.

<sup>85</sup> See 1906 Copyright Hearings, *supra* note 47, at 132. Between its enactment in 1895 and its incorporation in the copyright law, the statutory provision prohibiting copyright in government publications had been interpreted as only disallowing copyright in printed, published works of the Government. See Section II.B *supra*.

This historical interpretation conveniently meshes with the particular wording used and is consistent with the terms which the Congress has used when referring to broader classes of works in the copyright statute. Section 8 itself utilizes the term "work" when identifying the class of materials which cannot be copyrighted because they are in the public domain or had been published prior to 1909 without notice of copyright.<sup>86</sup> The term "work" is likewise used in section 10 of the Code which prescribes the manner for securing a copyright upon publication.<sup>87</sup> In short, while the selection of the term "publication" was inartful and in all probability an unthinking adoption of the language of the prior printing law, the word choice seems deliberate and the term certainly encompasses a smaller class of material than the term "work."

The facts and the judicial opinions in *Sherr v. Universal Match Corporation*<sup>88</sup> illustrate the distinction between the use of the term "publication" and the broader term "work." There two soldiers with some artistic abilities were relieved from their other duties to design and create a statue which depicted a charging soldier dressed in full battle gear. The work was created by the plaintiffs largely during their duty hours and was fashioned from Army supplies and with Army equipment. Shortly before the statue was to be unveiled, one of the soldier-artists placed a copyright symbol on a portion of the statue where it was imperceptible to anyone who would view the statue once it had been put in place.

After the sculptors' discharge from the Army, they sued the defendant match company for infringing their copyright by manufacturing and selling match covers bearing a picture of the statue. The district court and the circuit court of appeals both granted the defendants'<sup>89</sup> motion for summary judgment on the basis that the plaintiffs were not entitled to a copyright in their production.

The district court found that the statue was not a "publication of the United States Government" because that term re-

<sup>86</sup> No copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to July 1, 1909, and has not been already copyrighted in the United States, or in any publication of the United States Government....

17 U.S.C. § 8 (1970) (emphasis added).

<sup>87</sup> "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title. . . ." 17 U.S.C. § 10 (1970).

<sup>88</sup> 297 F. Supp. 107 (S.D.N.Y. 1967), *aff'd*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970).

<sup>89</sup> The United States, not initially a defendant, intervened and asked, if the copyright were held to be valid, for an assignment of the copyright under 17 U.S.C. § 26 (1964) on the basis that the employees' rights in the property belonged to their employer.

fers only to printed matter,<sup>90</sup> but held that the plaintiffs were not entitled to a copyright because the statue had been published without valid notice of copyright.<sup>91</sup> The Second Circuit avoided the section 8 question,<sup>92</sup> and affirmed the judgment of the district court on the ground that any right in the statue vested in the Government under the provision of the copyright law dealing with "works for hire."<sup>93</sup>

The interesting point is that the Second Circuit also avoided the government's counterclaim that it be assigned the plaintiffs' copyright in the event that they prevailed. The circuit court saw no "necessity to make such a determination."<sup>94</sup> However, given the logic of the district court's reasoning and its citation of authority, a strong possibility exists that the Government could have obtained copyright in the statue had the notice of copyright been effective.

*Sherr* is not the only judicial opinion which has seemed to confine the term "publication" to printed material. In the first *Rickover* opinion, the Federal District Court for the District of Columbia noted that the only materials which were indisputably "publications of the United States Government" were those "prepared by a Government officer or employee as part of his official duties and issued by the Government as a public document."<sup>95</sup>

These cases highlight the inartful drafting of the act and suggest that any number of nonprinted materials can be the proper subject of a governmental copyright under the current law. This result is inconsistent with all the announced reasons behind the general prohibition of copyright in government-produced materials, and will be corrected if the House of Representatives passes the currently proposed revision of the copyright law or an equivalent bill and the President signs such a bill into law. Section 105 of the bill currently before the House<sup>96</sup> and of the bill which has already passed the Senate<sup>97</sup> proscribes copyright in any "work of the United States Government." The Senate Report accompanying the bill makes no mention that a purpose of the bill is to expand the coverage of

<sup>90</sup> 297 F. Supp. at 110-11.

<sup>91</sup> *Id.* at 112.

<sup>92</sup> 417 F.2d at 500.

<sup>93</sup> *Id.* at 501.

<sup>94</sup> *Id.* at 500 n.3.

<sup>95</sup> 177 F. Supp. at 603.

<sup>96</sup> H.R. 2223, 94th Cong., 1st Sess. § 105 (1975).

<sup>97</sup> S. 22, 94th Cong., 1st Sess. § 105 (1975).

the current section 8 to clarify the *Sherr* problem,<sup>98</sup> but the intent is obvious. After enactment of this or similar legislation, there will be clear authority to ensure that not only writings, but artistic works created by government officers or employees in the scope of their duties will be in the public domain. Until such time, however, the current language of the Army regulation will continue to be suspect.

2. *Material "prepared by an employee as part of his duties, either express or implied..."*

There is no dispute that publications created by government officers or employees within the scope of their duties may not be copyrighted.<sup>99</sup> This phraseology obviously includes publications which such personnel create under direct orders from competent authority.<sup>100</sup> It is, however, more difficult to determine the status, for copyright purposes, of materials not so directly related to a governmental employee's express responsibilities.

Of the courts which have considered the requisite nexus between an officer or employee's duties and a work he seeks to copyright, those in the *Sherrill* and *Rickover* cases differentiated between material which has been expressly required by the terms of the author's employment and material which has been prepared on the individual's own volition, although it relates in some way to his governmental duties. In *Sherrill v. Grieves*, the defendant-infringer asserted that the pamphlet entitled "Military Sketching" was created as part of the author's implied duty to provide the school's students with the best instruction of which he was capable, including the preparation of the text:

[I]t was his legal contract duty to the Government to give to the student officers the identical instruction contained in the pamphlet if that was the best treatment of the subject of which he was capable, and that when he adopted as a means of performing his duty written instructions and had them printed at Government expense in a Government printery the court must assume he had the consent of his superior officers at the school to discharge his duties in that way.<sup>101</sup>

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<sup>98</sup> S. REP. No. 94-473, 94th Cong., 1st Sess. 56-57 (1975) [hereinafter cited as S. REP. No. 94-473].

<sup>99</sup> See, e.g., REPORT OF REGISTER, *supra* note 3, at 131; Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 1, at 654-58 (1967) [hereinafter cited as 1967 Hearings].

<sup>100</sup> See, e.g., SPJGP 1942/5928, Dec. 17, 1942, 1 BULL. JAG 375.

<sup>101</sup> 57 Wash. L. Rptr. 286, 290, 20 C.O. Bull. 675, 687 (Sup. Ct. D.C. 1929).

The court found that because the officer's superiors had the book printed and because the officer was not obliged to reduce his lectures to writing (or that if he did so they did not become the property of his employer) material relating to his employment did not become the property of the Government.<sup>102</sup>

In the four *Rickover* opinions, the courts drew distinctions between the rights of authors who are "hired to prepare the publications"<sup>103</sup> and are thus ineligible to secure private copyright, and those who are permitted to copyright their works despite the "circumstance that the ideas for the literary product may have been gained in whole or in part as a result or in the course of [their] official duties."<sup>104</sup> The circuit court read the statutory provision as referring to materials "commissioned or printed at the cost and *direction* of the United States."<sup>105</sup> While the Supreme Court's decision turned on the declaratory judgment issue, on remand the district court in its findings of fact concluded that the writing and delivery of the speeches

were not part of Rickover's duties. . . . The speeches were not made in the furtherance of his duties. His duties did not call for the writing and delivery of these speeches, nor was he requested to deliver them by his superiors.<sup>106</sup>

In at least ten other passages of the final decision, the district court commented on the fact that the speeches did not constitute a part of Rickover's official duties,<sup>107</sup> and at one point noted that administrative practice (an issue in which the Supreme Court had expressed interest)<sup>108</sup> approved of government employees writing privately on matters within their field of expertise so long as the materials had not been prepared at the direction of official supervisors or as a part of the employee's official duties.<sup>109</sup>

These cases do not clearly differ *e* between the terms which are used in the regulation: duties which are "express" and those which are merely "implied." If any such distinction is present it is between "official" duties, those prescribed by order or regulation and thus "contractual"; and those, which

<sup>102</sup> *Id.* at 290, 20 C.O. Bull. at 687.

<sup>103</sup> *Public Affairs Associates, Inc. v. Rickover*, 177 F. Supp. 601, 603 (D.D.C. 1958).

<sup>104</sup> *Id.* at 604.

<sup>105</sup> *Public Affairs Associates, Inc. v. Rickover*, 284 F.2d 262, 268 (D.C. Cir. 1960) (emphasis added).

<sup>106</sup> *Public Affairs Associates, Inc. v. Rickover*, 268 F. Supp. 444, 453 (D.D.C. 1967) (finding number 26).

<sup>107</sup> *Id.* at 453, 454, 455, 456.

<sup>108</sup> See *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 113 (1962).

<sup>109</sup> 268 F. Supp. at 455 (finding number 45).

although not "official" in the first sense, are performed under orders from competent authority. If the Army Regulation equates the first of these terms with "express" duties and the latter with "implied" duties, then the regulation is clearly in harmony with the cases, although the categories are somewhat misleadingly titled.<sup>110</sup>

Another category of works may, however, be included in the concept of materials produced in the course of an employee's "implied" duties. This type of work may be what Grieves and the Public Affairs Associates alleged was involved in their respective cases. This class of materials encompasses those materials which fit in neither of the categories noted above, but nonetheless are initiated by an author to further a governmental purpose. For example, had Sherrill written his book primarily for his military students (although totally on his own initiative) or had Admiral Rickover spoken to advance governmental objectives, their endeavors could be described as within their "implied" duties as that term is normally used.<sup>111</sup>

Such a reading of the term allows the author to characterize his work in the manner most favorable to his objectives: Sherrill could argue that his book was essentially a civilian publication which he merely permitted the Army to use; Rickover could insist that all his speeches were delivered in his private, rather than in his governmental capacity. By avoiding statements which could be construed to be official, they both could claim copyright in their works.<sup>112</sup> The author's characterization of the transaction makes a substantial difference in the copyright result, but in no other respect. So long as a governmental author adopts a private posture and views himself as a private individual when creating literary material, he can restrict the reach of the "implied" duties to something closely resembling "express" duties. This result is echoed by the *Rickover* court's finding of fact number 26.<sup>113</sup> Thus by engaging in work of their own volition, characterizing their work as "private" and avoiding "official" publication, government authors may write concerning matters within their official competence without

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<sup>110</sup> A [work] produced by an officer or enlisted man pursuant to a willingly accepted assignment, the duties of which involved the production of such work, belongs to the Government of the United States. . . . A work created by an officer or enlisted man in the course of his official duties but not by virtue of a specific assignment to create such work, belongs to the author thereof.

SPJGP 1942/5928, Dec. 17, 1942, I BULL. JAG 375-76.

<sup>111</sup> *But see id.*

<sup>112</sup> Mr. Justice Reed, writing for the District of Columbia Circuit in the *Rickover* case, characterized the purpose of section 8 as prohibiting copyright in "authorized expositions on matters of governmental interest by governmental authority." Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262, 268 (D.C. Cir. 1960).

<sup>113</sup> See text accompanying note 106 *supra*.

creating noncopyrightable "publications of the United States Government."<sup>114</sup>

The opinion in *Sawyer v. Crowell Publishing Company*<sup>115</sup> is in conflict with this interpretation. There the court asked whether the literary product in question "relates directly to the subject matter of the plaintiff's work"<sup>116</sup> and held that a map made by the plaintiff's subordinate could not be validly copyrighted. The court failed to cite the statute under which it purported to act; failed to mention or discuss *Sherrill v. Grieves* or any of the pertinent government publication cases; and has been criticized for incorrectly reading the cases upon which it relied to reach its decision.<sup>117</sup> Moreover, using the test the *Sawyer* court used, the *Rickover* court would have been compelled to reach the opposite result from its actual holding. For these reasons, the *Sawyer* case must be dismissed as unpersuasive, and the reading of the Army Regulation limited to cases where the creation of the work in question is expressly within the scope of the orders describing the author's responsibilities; directed by competent authority; or conceded by the author to be within the implied scope of his duties by actions inconsistent with private ownership of the work.

### *3. Governmental license in works created through the use of any governmental time, material or facilities.*

A third provision of the regulation which does not seem compatible with the cases interpreting the copyright law is the provision which purports to give the Government a royalty-free license to utilize materials created with the aid of any governmental time, material or facilities. The courts and even The Judge Advocate General have stated that the use of governmental facilities to prepare copyrighted works is not a concern of the copyright laws. Although the Supreme Court indicated its concern with the "use . . . of government facilities and government personnel in the preparation of [Admiral Rickover's] speeches,"<sup>118</sup> each of the courts which considered the issue found that the slight use of governmental facilities and per-

<sup>114</sup> The Senate Report accompanying the recently enacted S. 22, *see note 79 supra*, suggests that this result will continue under the proposed legislation if it is enacted into law. "A Government official or employee should not be prevented from securing copyright in a work written at his own volition and outside his duties, even though the subject matter involves his Government work or his professional field." S. REP. No. 94-473, *supra* note 98, at 56.

<sup>115</sup> 46 F. Supp. 471 (S.D.N.Y. 1942); *see* text accompanying notes 54-58 *supra*.

<sup>116</sup> 46 F. Supp. at 473.

<sup>117</sup> *See note 58 supra*.

<sup>118</sup> 369 U.S. 111, 113 (1962).

sonnel did not disqualify Rickover from obtaining copyright protection for his speeches. In fact, in the final decision which held Rickover's copyright in two of the speeches valid, the district court stated, "[T]he alleged use by Admiral Rickover of certain Department of Defense facilities in preparing the speeches [is] neither material to the case nor [a] proper [subject] of comment for this court."<sup>119</sup>

A 1942 opinion of The Judge Advocate General stated a similar view:

The rights of the Government to a work produced by an officer or enlisted man does [sic] not depend upon the production of such work during or outside or [sic of?] office hours. . . . When copyrightable material . . . belongs to [an] officer or enlisted man, [it] may not be used . . . without the consent of the owner.<sup>120</sup>

However, it is not the copyright law itself which empowers the Government to utilize material created with government time, material or facilities, but rather the lack of a forum in which the copyright owner may assert his rights against the United States.

Prior to 1960 the Government could publish material from any source without fear of liability for infringement because it had never waived its sovereign immunity with respect to such suits. This facet of governmental immunity was the subject of some criticism,<sup>121</sup> and in 1960 Congress permitted certain infringement suits to be brought against the Government in the Court of Claims.<sup>122</sup> One of the clauses of the statute which waived this sovereign immunity provided that

This subsection shall not confer a right of action on any copyright owner . . . [whose] work was prepared as a part of the official functions of the employee [of the U.S. Government] or in the preparation of which Government time, material, or facilities were used. . . .<sup>123</sup>

Thus the royalty-free license of the Government stems not from the copyright law itself, but rather from the fact that a certain limited group of copyright owners is unable to sue the Government if it uses their works without authorization. Consequently, the provision has no effect on the validity of the copyright itself; the copyright may be enforced against any infringer other than the Government or its authorized agent.<sup>124</sup>

<sup>119</sup> 268 F. Supp. at 449.

<sup>120</sup> SPJGP 1942/5928, Dec. 17, 1942, 1 BULL. JAG 375-76.

<sup>121</sup> See Gunnels, *Copyright Protection for Writers Employed by the Federal Government*, ASCAP COPYRIGHT SYMPOSIUM No. 11, at 138 (1960); Stiefel, *Piracy in High Places—Government Publications and Copyright Law*, ASCAP COPYRIGHT LAW SYMPOSIUM No. 8, at 1 (1957).

<sup>122</sup> Act of Sept. 8, 1960, Pub. L. No. 86-726, § 1, 74 Stat. 855.

<sup>123</sup> 28 U.S.C. § 1498(b) (1970).

<sup>124</sup> *Id.*

### B. BLATANT VIOLATIONS OF THE STATUTORY PROHIBITION

Several examples will illustrate that government officers and employees have copyrighted works which are clearly prohibited from being the subject of copyright under the accepted interpretation of section 8. Beyond the few examples given here,<sup>125</sup> registrations in the Copyright Office indicate numerous instances of noncompliance with the terms of the statute,<sup>126</sup> a fact which has prompted one advocate of strict enforcement of the clause to suggest that the prohibition "is honored more by its breach than its practice."<sup>127</sup> Even if this observation is somewhat extreme, these incidents certainly manifest the creativity of governmental officials in forging justifications for illegal conduct. Moreover, each of the reasons presented to justify such copyrights directly conflicts with the theories underlying the prohibition of copyright in governmental publications.

Inadvertence is not to be overlooked as an explanation for the assertion of copyright in some materials. Clearly this was the case when President Kennedy's book, *To Turn the Tide*, was published with the statutorily prescribed notice of copyright in the author's name. No claim was made that the book was a work falling outside the prohibition; indeed the work's subtitle clearly indicated that the contents were "public statements . . . setting forth the goals of his first legislative year." The probable explanation for the assertion of copyright in this volume is that the publisher followed his normal practice and included the notice as a matter of course. The author quickly acknowledged the "mistake" and ensured that it would be corrected in future editions.<sup>128</sup>

Other intentional assertions of copyright have been justified by departmental officers who no doubt have had the best interests of the Government in mind. Unfortunately, their inter-

<sup>125</sup> See also the example in the text accompanying notes 160-164 *infra*.

<sup>126</sup> Berger, *supra* note 32, at 34.

<sup>127</sup> Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 222 (1965) [hereinafter cited as 1965 Hearings] (testimony of Theodore A. Serrill).

<sup>128</sup> See Brucker, *Profits from Public Papers: The Government Copyright Racket*, SATURDAY REVIEW, Aug. 11, 1962, reprinted in Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 1, at 651, 652 (1967) [hereinafter cited as 1967 Hearings]. This practice continues. See Prugh, *Current Initiatives to Reaffirm and Develop International Law Applicable in Armed Conflict*, 8 INT'L LAWYER 268 (1974), copyrighted by the American Bar Association. The author was a government officer and the article was an extract of certain official testimony given before Congress on behalf of the Department of the Army.

pretations of what course would best serve the nation are in direct opposition to the congressionally mandated and judicially interpreted prohibition of copyright in governmental publications.

The 1961 Library of Congress study of copyright in government publications investigated the frequency of the registration of government written and produced materials in the Copyright Office and found a "substantial" number of such works to have been registered.<sup>129</sup> In many cases the government agency for which the work was initially produced supported the author's application for registration on the grounds that the work had been prepared outside the scope of the author's duties or on behalf of a nonappropriated fund agency.<sup>130</sup>

In other cases, publication outside governmental channels was alleged to justify the assertion of copyright. Because the publisher bore all costs and saved the Government the necessity of incurring such expenses, private copyright was justified.<sup>131</sup>

One of the more controversial, and now reportedly abandoned,<sup>132</sup> uses of copyright involved the Army's assertion of copyright in officially produced military histories. Unquestionably these materials were produced by government employees within the scope of their duties and they were printed at the Government Printing Office. The acknowledged purpose of the copyright restriction was, in the words of General C. G. Dodge, to "prevent quoting of material out of context."<sup>133</sup> Another Army officer commented that the copyright would prevent "sensationalizing"<sup>134</sup> of reported events. In addition to raising

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<sup>129</sup> Berger, *supra* note 32, at 34.

<sup>130</sup> *Id.* Berger's inclusion of military service schools as nonappropriated fund agencies must be an oversight. These instrumentalities are funded by congressional appropriations. See, e.g., Sherrill v. Grieves, 57 Wash. L. Rptr. 286, 290, 20 C.O. Bull. 675, 685 (Sup. Ct. D.C. 1929).

<sup>131</sup> Berger, *supra* note 32, at 34. One basis for justifying the procedure of extra-governmental publication, but not necessarily the assertion of copyright in such publications is a 1943 Bureau of the Budget Circular. See *id.* at 34 n.36. The assertion of copyright in such materials is directly contradictory to the Register's construction of section 8. See REPORT OF REGISTER, *supra* note 3, at 131.

<sup>132</sup> See 1967 Hearings, *supra* note 128, at 653. Compare, R. SMITH, THE ARMY AND ECONOMIC MOBILIZATION (1959) written by the Office of the Chief of Military History, Department of the Army and copyrighted in the name of Major General Richard W. Stephens, Chief of that Office with M. MATLOFF, STRATEGIC PLANNING FOR COALITION WARFARE, 1943-1944 (1959) which appears to begin a trend of omitting any assertion of copyright.

<sup>133</sup> See 1967 Hearings, *supra* note 128, at 653.

<sup>134</sup> *Id.* The desire to use copyright restrictions to prevent "inappropriate" use of military material is not new. A 1913 opinion of The Judge Advocate General considered an engineer's desire to copyright photographs "in order to insure that they would not

serious questions of censorship,<sup>135</sup> these assertions are flatly contrary to the major reasons for the prohibition of copyright in government publications.

### C. USE OF COPYRIGHT TO RESTRICT ACCESS TO DOCUMENTS

Although one of the guiding principles behind the statutory provision which prohibits copyright in government publications is that the widest possible public dissemination of such works should be fostered, the peculiar phrasing of the statute may in some cases permit an opposite result. Discussing the proper definition of the term "publication," Professor Nimmer suggests three possible meanings. First, he proposes that a publication can be "any writing (in the constitutional sense), whether or not published. . ." <sup>136</sup> Next, he suggests that the term could mean a minimal or limited publication,<sup>137</sup> and finally that the word might be considered to mean a general publication.<sup>138</sup> Nimmer selects the first definition as the most persuasive on the ground that any construction which would allow the federal government to prohibit the dissemination of material because of its property interest in the document would run afoul of the first amendment.<sup>139</sup>

Putting this argument to the side for a moment, let us first consider the other alternatives beginning with the view that "publication" means a general publication. This interpretation of the term finds strong support in the history of the provision's enactment and in the particular language of the statute. Both these considerations have been dealt with in depth in a previous section of this article,<sup>140</sup> and it is important to note that be used for advertising purposes and general circulation." DIG. OPS. JAG 1912-1940 *Military Publications*, para. 8, at 946 (1913).

<sup>135</sup> See 1967 Hearings, *supra* note 128, at 653; Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 320-22 (1974) [hereinafter cited as Nimmer].

<sup>136</sup> 1 M. NIMMER ON COPYRIGHT § 66, at 266.2 (1976).

<sup>137</sup> *Id.*, citing MacMillan Co. v. King, 223 F. 862 (D.C.D. Mass. 1914).

<sup>138</sup> 1 M. NIMMER ON COPYRIGHT § 66, at 266.2 (1976).

<sup>139</sup> *Id.* Nimmer recognizes that national security, as well as other considerations, could justify prohibition of or restrictions on disclosure. Army regulations require that certain official and unofficial speeches and writings be cleared before they are published or delivered. While security appears to be the only ground upon which clearance may be denied, see AR 360-5, paras. 4-3d & e; 4-4b(3), the requirement that active duty military members submit all material to be published in nationally circulated media for prepublication clearance, AR 360-5, para. 4-2a(2), may be unconstitutionally overbroad. See *New York Times Co. v. United States*, 403 U.S. 713 (1971); *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954); Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187, 198-204 (1957).

<sup>140</sup> See section IV.A.1 *supra*.

the result they require is not unreasonable when viewed in conjunction with the reasons the statutory provision was enacted. The statute was undoubtedly enacted more to prevent individuals from obtaining private rights in publicly-created property<sup>141</sup> than to prevent the Government from dealing with its unpublished manuscripts. In fact, it is probable that this aspect of the problem was not even considered and is an outgrowth of current history rather than of the statute itself.

The argument that the term "publication" must be interpreted to mean a limited publication is based on the anomalous results that a stricter reading produces. Nimmer hypothesizes the situation where an inaugural address is delivered, but not generally published; the author retains his common law copyright and could forbid republication or dissemination of the speech.<sup>142</sup> Similarly, the Government could utilize its common law copyright to suppress dissemination of a written document which had only been distributed to a limited number of persons for limited purposes, and thus not published.<sup>143</sup>

While these results are contrary to some of the purposes behind the common law and statutory prohibitions of copyright in governmental publications, the history of the statutory provision again illustrates that interpreting the word "publication" as limited publication would be wholly outside the drafters' intent.<sup>144</sup> Likewise, the particular word chosen by the drafters certainly does not give any reason to suspect that the concept of limited publication was to have any relevance to the governmental copyright prohibition.

<sup>141</sup> "The legislative history of the initial prohibition in the Printing Law of 1895 indicates that it was aimed at precluding copyright claims by private persons in their reprints of Government publications." SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAWS 130 (Committee Print 1965).

<sup>142</sup> Nimmer, *supra* note 135, at 320-21.

<sup>143</sup> *Id.* at 320.

<sup>144</sup> This situation is all the more true because the concept of "limited publication" had not yet been clearly developed by the American courts at the time of the enactment of the 1909 statute. While the theory was discussed by commentators, *see, e.g.*, DRONE, *supra* note 20, at 117 (written in 1879), the notion that presentation of a play was not in and of itself a general publication was not decided by the Supreme Court until 1912 in its decision in *Ferris v. Frohman*, 223 U.S. 424, 435 (1912). There had, however, been earlier decisions on point, *see* Collins, *Playright and the Common Law*, 15 CALIF. L. REV. 381 (1927). *See also* American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907) (public exhibition of painting not a general publication); *Heim v. Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946) (public playing of song not a general publication); *King v. Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963) (delivery of Dr. M.L. King, Jr.'s "I have a dream" speech not a publication).

The application of these principles to a manuscript was first made in *White v. Kimball*, 94 F. Supp. 502 (S.D. Cal. 1950), *rev'd on other grounds*, 193 F.2d 744 (9th Cir. 1952).

Nimmer's preference for the definition of the term as meaning a "writing (in the constitutional sense)" is subject to criticism on several grounds. First, and most basic, is the historical argument. It is clear that the Congress considered only printed matter and paid no consideration to unprinted material when it enacted the printing law's restriction. Second, use of the term "publication" is quite awkward if the intended term was "writings" in the constitutional sense.<sup>145</sup>

Most interesting, however, is the argument that the first amendment precludes the Government from asserting literary property in any of its documents so as to forbid any dissemination. Common law copyright arises outside the Constitution and is equally available to all authors. While the limitless nature of the right may raise some troublesome questions,<sup>146</sup> because the right has its origin in English common law, it is difficult to see precisely what law Congress has enacted to abridge freedom of speech or the press. Even if such a law be found, it is questionable how the government's assertion of property in a work impinges upon freedom of speech or the press any more than the enforcement of a private author's rights. Indeed, it is difficult to accept this one attack on the constitutionality of the copyright system without following the argument to its logical result: The copyright laws themselves are restrictions on a free press and thus unconstitutional.<sup>147</sup> In addition, this argument would call into question those statutory provisions which permit the United States to assert copyright in certain types of documents.<sup>148</sup> The overbreadth of this argument dooms its persuasiveness.

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<sup>145</sup> The current statute provides: "The works for which copyright may be secured under this title shall include all the writings of an author." 17 U.S.C. § 4 (1970). The revisers of the copyright law have implicitly concluded that the phrase "all the writings of an author" in section 4 "exhaust[s] the Constitutional power of Congress to legislate in this field." S. REP. No. 94-473, *supra* note 98, at 50.

<sup>146</sup> The Constitution gives Congress the power to "secur[e] for limited times to Authors . . . the exclusive right to their respective writings . . ." U.S. CONST. art. I, § 8, cl. 8 (emphasis added). In considering the pending revision of the copyright law, the Senate Judiciary Committee noted that the "limited Times" provision of the Constitution "has become distorted under the traditional concept of 'publication'." S. REP. No. 94-473, *supra* note 98, at 113.

<sup>147</sup> It is possible that many of the free speech questions raised by the copyright law are obviated by the doctrine of fair use. See note 148 *infra*.

<sup>148</sup> See Section IV.D *infra*. Nimmer expends considerable energy wrestling with the conflict between copyright and the first amendment. 1 M. NIMMER ON COPYRIGHT § 9.2, at 28 through 28.31 (1976). Perhaps one significant source of this conflict is the increasing emphasis on the asserted right to freely disseminate information concerning newsworthy events. Nimmer's extensive analysis of the conflict between copyright and first amendment rights uses as examples the Zapruder film of President Kennedy's

In short, then, Professor Nimmer's reading of the term "publication" in section 8 is in all probability erroneous. The term must refer to printed material that has been generally published. If this interpretation of the statute is correct, an admittedly anomalous result follows: The Government may properly assert a common law copyright in material that has not been the subject of a general publication. This result is at odds with the policy of encouraging the ready availability of materials which the common law and section 8 of the copyright act seek to promote. Nonetheless, the Government can legally prevent the use of material which has not yet been generally published.

The Judge Advocate General of the Army is of the opinion that the Government possesses common law copyright in unpublished material<sup>149</sup> which can serve as a basis for preventing the dissemination of such material,<sup>150</sup> although in one recent case he advised against asserting that power for practical reasons.<sup>151</sup> In view of the definitional analysis of the term "publication" presented above, this view seems correct despite its apparent inconsistency with some of the goals the statute attempts to promote.

The theory behind the provision and the theoretical application of the copyright law will be harmonized if the House of Representatives passes and the President signs legislation similar to that passed by the Senate in the last two sessions of Con-

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assassination in Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968) and photographs of the My Lai incident. With regard to the former, "it gave the public authoritative answers that it desperately sought; . . .", NIMMER, *supra* § 9.232, at 28.24; and of the latter, "It would be intolerable if the public's comprehension of the full meaning of My Lai could be censored by the copyright owner of the photographs." *Id.* § 9.232, at 28.23. It is clear that Nimmer favors increased public exposure of materials of public interest at the expense of copyright. Much of this tension is released by the doctrine of fair use, which at least one author contends has constitutional dimensions. "[I]t is here submitted that fair use—the right of reasonable access to copyrighted materials—has constitutional protection both directly and under the penumbra of the first and ninth amendments." Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 NOTRE DAME LAWYER 790, 791 (1975). However, whether this doctrine has any application to unpublished works under the current statute is open to question by the language of the copyright act:

Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent . . .

17 U.S.C. § 2 (1970) (emphasis added).

<sup>149</sup> DAJA-AL 1976/4233, 3 June 1976; DAJA-AL 1974/3455, 25 Feb. 1975.

<sup>150</sup> DAJA-AL 1976/4233, 3 June 1976.

<sup>151</sup> Particularly the probable unwillingness of the Department of Justice to pursue legal remedies under 17 U.S.C. § 2, and the possible mooting of the issue by proposed legislation.

gress.<sup>152</sup> The legislation proposed in the House and passed in the Senate contains two provisions, one technical and the other fundamental, which would bring about this change.

The language of the new provision which prohibits copyright in governmental materials denominates the category "work[s] of the United States Government"<sup>153</sup> and precisely defines the meaning of the term in a definitional section.<sup>154</sup> Even without this particular revision, the proposed legislation would eliminate the possibility that the Government, or indeed any author, could utilize a common law copyright to control access to all but a minute class of works. The congressional bills propose to eliminate the dual system of common law and statutory copyright protection by making statutory copyright protection the exclusive means of protecting works as soon as they are "created."<sup>155</sup> No longer will "publication" mark the dividing line between two different types of protection. As soon as a work is "fixed in a copy or phonorecord for the first time"<sup>156</sup> it obtains statutory protection for the indicated term, although the author may choose not to publish the work.<sup>157</sup>

Thus, through the enactment of a new law Congress can implicitly adopt Professor Nimmer's broad view that the Government should not be able to restrict access to its intellectual products by virtue of its property rights in them. This revision brings the statute into harmony with the theory behind the law that ready availability of public documents should be fostered.

#### D. COPYRIGHT IN MATERIALS PRODUCED UNDER GOVERNMENT CONTRACT

The prior sections have indicated that works created by employees of the Government can and have been copyrighted under the operation of the current statute. The pending revision of the copyright law will close two of the loopholes which permit the general purposes of the provision to be avoided. However, the current statute only precludes copyright in publications produced by employees within the scope of their du-

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<sup>152</sup> S. 22, 94th Cong., 1st Sess. (1975), which was passed by the Senate on February 17, 1976; and S. 1361, 93d Cong., 1st Sess. (1973) which was passed by the Senate on September 9, 1974.

<sup>153</sup> S. 22, 94th Cong., 1st Sess. § 105 (1975).

<sup>154</sup> "A 'work of the United States Government' is a work prepared by an officer or employee of the United States Government as part of his official duties" *Id.* § 101.

<sup>155</sup> *Id.* § 302. *See also* S. REP. NO. 94-473, *supra* note 98, at 112-14.

<sup>156</sup> *Id.* § 101.

<sup>157</sup> S. REP. NO. 94-473, *supra* note 98, at 115-16.

ties;<sup>158</sup> and while the proposed bills broaden the class of materials covered through substitution of the term "works," the status of the author as an "officer or employee" is still a crucial factor limiting the scope of the prohibition. No restriction is currently placed on governmental documents produced under contract or grant, and the proposed legislation will continue this practice.<sup>159</sup> This situation has produced numerous cases where the purposes of the prohibition are clearly flouted, and the authors and sponsors, as usual, have justified their actions on grounds diametrically opposed to the theory of the Congress which enacted the initial prohibition on copyright in government publications and judicial decisions predating and succeeding that legislation.

One of the more noted instances of copyright of a government sponsored publication is the dual publication of Professor Henry D. Smyth's *Atomic Energy for Military Purposes*<sup>160</sup> by the Princeton University Press and the Government Printing Office. The Atomic Energy Commission, which sponsored the work, reportedly authorized the commercial publication because it expected significant public demand for the book.<sup>161</sup> Both publications bore notice of Professor Smyth's copyright and both enjoyed notable sales.<sup>162</sup> The GPO edition went out of print, and the Princeton edition reportedly continues to sell despite its higher cost.

The questions of public policy raised by this publication are strikingly similar to those raised in connection with Mr. Richardson and his edition of the presidential messages. If the Government Printing Office could or would not meet the demand for a publication, any enterprising publisher could obtain

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<sup>158</sup> See, e.g., REPORT OF REGISTER, *supra* note 3, at 131; 1967 Hearings, *supra* note 99, at 654-58.

<sup>159</sup> The bill [S. 22, 94th Cong., 1st Sess. (1975)] deliberately avoids making any sort of outright unqualified prohibition against copyright in works prepared under Government contract or grant. There may well be cases where it would be in the public interest to deny copyright [in such works] . . . . Where under the particular circumstances, Congress or the agency involved finds that the need to leave a work freely available outweighs the need of the private author to secure copyright, the problem can be dealt with by specific legislation, agency regulations, or contractual restrictions.

S. REP. NO. 94-473, *supra* note 98, at 56-57.

<sup>160</sup> The work was subtitled "The Official Report on the Development of the Atomic Bomb under the Auspices of the U.S. Government."

<sup>161</sup> See Hearings on H.R. 15638 superseded by H.R. 16897 Before the Subcomm. on Science, Research, and Development of the House Comm. on Science and Astronautics, 89th Cong., 2d Sess. 123 (1966) [hereinafter cited as SRDA Hearings].

<sup>162</sup> The Princeton edition reportedly outsold the GPO edition by a factor of three (125,000 to 40,000) despite its higher price. See DISCUSSIONS AND COMMENTS ON THE 1964 REVISION BILL (S. 3008, H.R. 11947, H.R. 12354), 88th Cong., 2d Sess. 51 (Committee Print Sept. 1965) (testimony of Mr. Manges).

a copy of the printing plates and meet the demand.<sup>163</sup> However, in this case that avenue was foreclosed by Mr. Smyth's copyright. In light of the Richardson controversy, why should a private copyright have issued to the author? In both cases the publication was an official report of the Government, and in both cases, money could—and if historical precedent is any guide—should have been appropriated for the author's compensation if his salary was insufficient to induce him to write the work.<sup>164</sup>

An analogous situation has developed with respect to materials produced under contract for the Office of Education. The large amount of money involved in research grants<sup>165</sup> generated interest in that Office's policy of permitting copyright in the results of funded research. While the Office must have originally permitted contractors to copyright the results of their work, in 1965 it reversed its policy and required all such materials to be placed in the public domain.<sup>166</sup> This policy, probably effectuated in order to comply with the spirit of the so-called Long Amendment,<sup>167</sup> also comports with the general theory which prohibits copyright in government materials.

However, this practice of prohibiting all copyright in government financed material ended in 1970.<sup>168</sup> At that time the Office of Education issued copyright guidelines which permitted the Commissioner of Education to authorize authors to secure copyright in work funded by that office to "preserve the integrity of the materials during development or as an incentive to promote the effective dissemination of final materials. . . ." <sup>169</sup> From its experience under the 1965 "public domain" policy, OE realized that publishers would not refine the contract ma-

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<sup>163</sup> 44 U.S.C. § 505 (1970).

<sup>164</sup> See text accompanying note 38 *supra*.

<sup>165</sup> This figure was reportedly \$100 million in 1967. See 1967 Hearings, *supra* note 99, at 649.

<sup>166</sup> 30 Fed. Reg. 9408-09 (1965).

<sup>167</sup> Senator Long would require that all material developed under government contract be placed in the public domain: "[A]ll information, copyrights, uses, processes, patents and other developments' resulting from Government research expenditures 'will be freely available to the general public.'" 1965 House Hearings, *infra* note 202, at 1922-23. See the Senator's extended remarks in 111 CONG. REC. 9343-45 (1965) where he outlined legislative acts which have contained this provision. At least two of the statutes, the Saline Water Act of Sept. 22, 1961, Pub. L. No. 87-295, § 4(b), 75 Stat. 628 and the Coal Research and Development Act of July 7, 1960, Pub. L. No. 86-599, § 6, 74 Stat. 336, deal specifically with patent developments, but include a "catch all" provision for "all other developments."

<sup>168</sup> 35 Fed. Reg. 7317 (1970).

<sup>169</sup> *Id.* at § 1(e).

terials into a publishable format without a guarantee that their product could not be copied by competitors.<sup>170</sup> In short, the Office determined that a close alliance between contractors and private publishing houses was necessary to ensure the widest dissemination of materials created under OE contracts and grants, and thus make the most advantageous use of taxpayer money.<sup>171</sup> Under the OE authorizations for copyright, the Government retains an irrevocable, nonexclusive, royalty-free right to reproduce the material.<sup>172</sup>

The legal basis for this policy is questionable, although the practice is by no means limited to the Office of Education. While many agencies may permit copyright in government sponsored work on the basis of administrative practice, the Copyright Administrator of the Office of Education has asserted another justification. His position is that materials developed under contracts or grants are not subject to the prohibition of section 8 as a result of the Supreme Court's decision in *Rickover* which the Office of Education interprets as "limiting section 8 to works prepared by Government employees as part of their official duties."<sup>173</sup>

Such an interpretation of the Supreme Court's *Rickover* decision gleans a rather broad conclusion from a rather limited decision. As will be recalled, in *Rickover* the Court merely vacated the court of appeals' judgment and remanded the case to the district court because the record was insufficient to justify a decision on "matters of serious public concern . . . relat[ing] to claims of intellectual property arising out of public employment."<sup>174</sup> Nowhere did the Court intimate, much less state, that the situation in *Rickover* defined the outer limits of section 8.

Despite the questionable legality of these copyrights issued for material produced by OE contractors, none has been infringed and none has been judicially questioned.<sup>175</sup> This probably results from the general acceptance of the administrative practice of permitting authors or publishers to claim copyright in such materials. However, the factual basis upon which the

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<sup>170</sup> See U.S. OFFICE OF EDUCATION, COPYRIGHT PROGRAM INFORMATION 1 (rev. ed. 1972).

<sup>171</sup> BACHRACH, OE'S NEW COPYRIGHT POLICY (HEW reprint 1970).

<sup>172</sup> 35 Fed. Reg. 7319, §§ 8 & 9 (1970). Compare AR 27-60, para. 4-8b which deals with works prepared by employees.

<sup>173</sup> Letter from Morton Bachrach to Brian Price, March 5, 1976 [hereinafter cited as Bachrach letter].

<sup>174</sup> 369 U.S. 111, 112-13 (1962).

<sup>175</sup> Bachrach letter, *supra* note 173.

decision to authorize copyrights rests<sup>176</sup> is diametrically opposed to the theory underlying both the provision in the printing law and section 8 and its predecessors. Because Congress has declared that public dissemination is best achieved through the open competition which is inspired by free access to the material, any exception to this policy should come through legislation rather than federal agency regulation.

The Department of Commerce did obtain an express exception to the prohibition of copyright in government publications when it successfully sponsored the Standard Reference Data Act<sup>177</sup> in the mid-1960's. This Act was an outgrowth of the National Standard Reference Data System which was established in 1963 to serve as a centralized source from which the American scientific community could obtain important data relating to the atomic and chemical properties of various substances.<sup>178</sup>

Of importance to this article is the congressional approach to what became section 6(a) of the final legislation, the provision permitting the Secretary of Commerce to obtain a copyright in certain critically evaluated data.<sup>179</sup>

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<sup>176</sup> That public dissemination will be best achieved by giving one person a monopoly on the material.

<sup>177</sup> Act of July 11, 1968, Pub. L. No. 90-396, § 6, 82 Stat. 340, codified at 15 U.S.C. § 290 et seq. (1970).

<sup>178</sup> For a description of the background and purposes of the Standard Reference Data Act see *SRDA Hearings*, *supra* note 161, at 1-11. Because individual quantifications of the properties of nuclear materials and other complex matter are often never published, or if published are not readily accessible to researchers, enormous expenditures of time, material and effort are wasted duplicating already ascertained data. In addition, many of the published data have not been obtained under adequate controls and as a consequence are insufficiently precise for the uses to which they will be put. To eliminate many of these uneconomical practices, the system undertook to centralize management, control testing procedures, compile critically evaluated data, and disseminate or make the data available to the scientific and engineering community. For further background information regarding the development of the Act, see 1968 TECHNICAL HIGHLIGHTS OF THE NATIONAL BUREAU OF STANDARDS, ANNUAL REPORT, FISCAL YEAR 1968, at 17-18.

<sup>179</sup> Notwithstanding the limitations contained in section 8 of Title 17, the Secretary may secure copyright and renewal thereof on behalf of the United States as author or proprietor in all or any part of any standard reference data which he prepares or makes available under this chapter, and may authorize the reproduction and publication thereof by others.

Act of July 11, 1968, Pub. L. No. 90-396, § 6(a), 82 Stat. 340.

As initially introduced, this provision did not envision the assertion of a copyright on behalf of the Government. In fact, the position of the Department seems unclear and hesitating throughout the hearings. For instance, at one point the Department expressed its desire to utilize a symbol as a hallmark of quality in critical evaluation and at the same time make it illegal for anyone to copy officially imprinted data. The purpose of these provisions was to ensure the integrity of the data and prohibit its improper use by unauthorized parties.

No person shall, without prior written authorization from the Secretary or his designee ...

The comments of the Library of Congress on the bill<sup>180</sup> indicated that the combination of the mark and the restriction on publication created the equivalent of a copyright in the material, although the provision was not limited as to time. Although the testimony published in the committee hearings never explicitly details when or why the legislation was altered to provide for copyright in materials produced under the Act, probable explanations are the facts that the initial provisions could not control foreign use of the data,<sup>181</sup> and that the peculiar phrasing could open a broad exception to section 8. The Bureau proposed the additional justification that the copyright would tend to support sales prices for the material at a level above that which GPO could statutorily charge and above which unprotected works could obtain, thereby providing a level of self-sufficiency for the program.<sup>182</sup>

It is clear that none of the asserted justifications could withstand judicial scrutiny in an action testing the validity of a copyright obtained on material created by a government employee in the course of his duties. However, a mere change in form, having the material produced by a contractor rather than by an employee, reverses the result, at least under current administrative practice. This practice is explicitly recognized in departmental regulations,<sup>183</sup> and shows no sign of abating.<sup>184</sup>

Nonetheless, this practice is equally antithetical to the reasons underlying the prohibition of copyright in government publications as the practice of permitting employees to copy right works produced within the scope of their duties would be.

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- (a) use the Standard Reference Data symbol or mark adopted pursuant to section 6 of this act or any colorable imitation thereof, or
- (b) copy any data compilation bearing the Standard Reference Data symbol or mark adopted pursuant to section 6 of this Act.

H.R. 15638, 89th Cong., 2d Sess. § 7 (1966).

<sup>180</sup> *SRDA Hearings, supra* note 161, at 60, 152-53.

<sup>181</sup> The testimony indicated that only through the use of copyright could the compilations be protected from unauthorized use abroad. *Id.* at 64-65, 95.

<sup>182</sup> *Id.* at 52, 57. See *Hearing on H.R. 37 Before the Subcomm. on Science Research and Technology of the House Comm. on Science and Technology*, 94th Cong., 1st Sess. 36 (1975) which showed that the system received \$91,000 in royalties in fiscal years 1973-75. See also 52 COMP. GEN. 332 (1972) for a description of the manner in which materials are published under the Act. The goal of providing self-sufficiency for a special program is also antithetical to the reasons for prohibiting copyright in government publications.

<sup>183</sup> See 41 C.F.R. § 3-16.950-315 A, § 15(a)-(c) (1975); 41 C.F.R. § 3-16.950-316, § 16(a)-(c) (1975) (Department of Health, Education and Welfare); 41 C.F.R. § 5-54.203 (1975) (General Services Administration); 41 C.F.R. § 9-15.5010-15 (1975) (Atomic Energy Commission).

<sup>184</sup> See note 159 *supra*.

Even before the statutory prohibitions were enacted, the common law precluded the assertion of copyright in expositions of the law because it accepted the premise that a no-copyright policy would foster the widest possible dissemination of material.<sup>185</sup> This judgment was reiterated in the printing law which gave printers an incentive to reproduce government documents by permitting the purchase of duplicate plates at a fraction over their cost.<sup>186</sup>

All the efforts to secure copyright on government financed materials proceed on exactly the opposite theory. The premise of the developers of the Smyth Report,<sup>187</sup> the Office of Education policy,<sup>188</sup> and the Standard Reference Data System<sup>189</sup> is that more effective dissemination of the material can be made if one publisher can monopolize production and distribution of an item. The argument is that without the protection accorded by the exclusive position a copyright gives no one will expend the necessary resources to adequately advertise or promote a work.<sup>190</sup> Although this argument does have a persuasive ring to it and has apparently been borne out in at least one field by the Office of Education's three policy reversals between the early 1960's and 1970,<sup>191</sup> a decision of such a fundamental nature is one to be made by Congress, not the executive departments.<sup>192</sup>

Similar to the common law rationale of free accessibility is the position taken by the Senate investigating committee following the enactment of the 1895 law. At that time the committee determined that the ready availability of documents to the public was more important than the savings in appropriated moneys that allowing a copyright in government documents would produce.<sup>193</sup> The Senate committee looking into the

<sup>185</sup> See text accompanying notes 13-20 *supra*.

<sup>186</sup> See text accompanying notes 33-35 *supra*.

<sup>187</sup> See text accompanying note 160 *supra*.

<sup>188</sup> See text accompanying notes 166-172 *supra*.

<sup>189</sup> See text accompanying notes 177-182 *supra*.

<sup>190</sup> But see the statement of Senator Long of Louisiana reprinted from the *Congressional Record* which calls attention to the fact that at least five commercial editions of the Surgeon General's report on smoking and the Warren Commission's report on President Kennedy's assassination competed with the GPO edition. The statement also enumerated several government publications with sales in the millions. ("Infant Care," "Prenatal Care" and "Your Federal Income Tax" among others). 1965 *House Hearings*, *infra* note 202, at 1924.

<sup>191</sup> See Bachrach, *supra* note 171, at 1. See also text accompanying notes 161-172 *supra*.

<sup>192</sup> Cf. *Kaplan v. Johnson*, 409 F. Supp. 190 (N.D. Ill. 1976) (separation of powers doctrine precludes executive branch from restricting rights of employees of Veterans' Administration in patents where the Congress has failed to enact a general statute).

<sup>193</sup> See text accompanying notes 36-38 *supra*.

Richardson Affair concluded that what was saved in appropriated funds would be more than consumed by taxpayers' expenditures. Government funded authors and distributors who obtain copyright in their work effectively obtain compensation both directly from the Government and indirectly from the taxpayer-purchasers who pay premium prices for their material. Again, one purpose of the prohibition of copyright in government documents, to provide the widest distribution of material at the lowest possible price, is frustrated. The privately published Smyth Report cost five times the GPO price;<sup>194</sup> the SRDA has funneled almost \$100,000 back into the Treasury in the past three years;<sup>195</sup> and the Office of Education assumes that the extra compensation a copyright will bring is necessary to induce the publishers' best efforts.<sup>196</sup> For the same reason Congress objected to Richardson's royalty payments, so should Congress object to the assertion of copyright in government-financed works.

The argument that an individual producing a work for hire is entitled to a copyright in the material is subject to the same objections noted previously. The normal presumption is that the copyright in a work made for an employer under contract belongs to the employer.<sup>197</sup> Of course this presumption may be contradicted by the specific understanding of the parties,<sup>198</sup> but it has never been suggested that the Government could validly make such an agreement with its regular employees, at least with respect to materials clearly covered by the statute.<sup>199</sup> The only argument of any merit which could conceivably justify a difference in treatment is that a contractor is more "independent" and has a greater interest in his creation. Nonetheless, the arguments in favor of the widest dissemination of government works apply equally in this context and should override the author's interest.

The arguments that it is not permissible to allow authors to copyright materials for which they are otherwise paid and that the use of government facilities should preclude the assertion of a private copyright should apply with equal force to contractors and employees. The contractor presumably accounts for

<sup>194</sup> Forty cents for the paper bound GPO edition as opposed to \$2.00 for the Princeton cloth-bound edition. Princeton subsequently published a paperback edition and charged \$1.00 for that issue, still 2½ times more than GPO. See *SRDA Hearings*, *supra* note 161, at 123.

<sup>195</sup> See note 182 *supra*.

<sup>196</sup> See Bachrach, *supra* note 171, at 1.

<sup>197</sup> 17 U.S.C. § 26 (1970).

<sup>198</sup> See, e.g., *Dielman v. White*, 102 F. 392 (C.C.D. Mass. 1900).

<sup>199</sup> But cf. *Sherr v. Universal Match Corp.*, 417 F.2d 497, 502 (Friendly, J., dissenting).

his costs in preparing his bid; and these costs should be frankly acknowledged and paid from appropriations<sup>200</sup> rather than by the taxpayer-purchasers.

#### V. CONFORMING THE STATUTE AND ADMINISTRATIVE PRACTICE TO THE THEORY OF THE COPYRIGHT LAW

It is clear that the dichotomy in results allowed by the characterization of a work's author as an "employee" or as a "contractor" bears no rational relation to the reasons underlying the prohibition of copyright in governmental publications. The hearings on section 8 have not approached the problem from the perspective suggested in this article, but the initial proposals contained provisions which would have permitted occasional deviations from the general prohibition against copyright in government works.<sup>201</sup> However, despite support for this proposal from several federal agencies,<sup>202</sup> first the Register<sup>203</sup>

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<sup>200</sup> If the position taken by the Senate committee investigating the Richardson Affair can serve as a guide. See text accompanying note 37 *supra*.

<sup>201</sup> When the Register of Copyrights gave his report on the general revision of the copyright law, he included a proposal which would have permitted the Joint Committee on Printing to grant express exceptions to the government copyright prohibition in order to accommodate the particular needs of individual government agencies. REPORT OF REGISTER, *supra* note 3, at 158, Recommendation A8. See also H.R. 11947, 86th Cong., 2d Sess. § 4(c) (1964).

<sup>202</sup> The Department of Defense urged Congress to enact a limited exception to the general prohibition of copyright in government works. The Department's basis for its suggestion was that works not published through the Government Printing Office cannot, as a practical matter, be offered to commercial firms without offering the printer the protection of a copyright. Without this protection, it was argued, publishers will not take the risks of preparing and publishing materials and they would go unpublished. Hearings on H.R. 4347, H.R. 5680, H.R. 6831 and H.R. 6835 Before Sub-comm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. 1122, 1176-78 (1965) [hereinafter cited as 1965 House Hearings]. The Department of Defense, *id.*, the Atomic Energy Commission, *id.* at 1135-36, and NASA, *id.* at 1181-83, urged Congress to enact a limited exception to the general rule in order to allow private enterprises to market the publications, which they do more efficiently than GPO. An additional reason these agencies urged the adoption of such a provision was that publications which are not copyrighted in this country may be precluded from being copyrighted abroad as a result of Article IV of the Universal Copyright Convention. *Id.* at 1123.

<sup>203</sup> The arguments of the agencies were not persuasive to the Copyright Office and it recommended elimination of any exception because the cases requiring the invocation of the procedure would be "quite rare," SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAWS 10 (Committee Print 1965), and insufficient in number to "justify setting up the elaborate procedures and safeguards . . . to insure against abuse of privilege." 1965 House Hearings, *supra* note 202, at 1858 (testimony of Mr. Kaminstein, Register of Copyrights).

and then the Senate<sup>204</sup> retreated from this position. In fact the Senate, in its report accompanying its recently passed copyright bill, expressly acknowledged and confirmed the current administrative practice.<sup>205</sup>

Although the provision permitting exceptions to the general rule of the current section 8 was deleted from the copyright proposals sponsored by the Register and enacted by the Senate, it provides a convenient perspective from which to approach the question of how to conform the government publications exception to the reasons underlying the exception.

Briefly stated, the proposals would have allowed the assertion of copyright in certain employee created materials if the public interest would be better served by copyrighting the product. This decision would be made in conformity with administrative regulations and after certification by the head of the agency.<sup>206</sup> This provision, while applying only to works created by employees, makes a valuable contribution by shifting the question of copyrightability away from the author's status to a consideration of the work itself.

Today the Government produces a vast number of materials, many of which closely resemble works published by private concerns. The educational texts produced under contract and grant from the Office of Education are one example of this, and the tables of critical data produced through the Standard Reference Data System are another. The Government has assumed the responsibility for producing material of this nature for a number of reasons. It may develop educational materials to channel the national effort in a particular direction; and it may serve as a clearinghouse for scientific data because no other entity has the financial or organizational wherewithal to maintain such a project. Such situations present questions significantly different from the questions of whether a copyright can subsist in the text of a judicial opinion which interprets the law or whether an official speech outlining issues of foreign policy which concern the public<sup>207</sup> can become the exclusive property of the official who uttered it.

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<sup>204</sup> S. 22, 94th Cong., 1st Sess. § 105 (1975), passed by the Senate, 122 CONG. REC. S2047 (S. daily ed. 1976).

<sup>205</sup> See note 159 *supra*. But see introductory note, p. 19 *supra*.

<sup>206</sup> See H.R. 11947, 86th Cong., 2d Sess. § 4(c) (1964). See also S. 3008, 88th Cong., 2d Sess. (1964); H.R. 12354, 88th Cong., 2d Sess. (1964).

<sup>207</sup> See, e.g., Mr. Justice Reed's characterization of the purposes of section 8 as prohibiting copyright in "authorized expositions on matters of governmental interest by governmental authority," Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262, 268 (D.C. Cir. 1960) and "guides for official action." *Id.* at 269.

Perhaps a distinction similar to that which differentiates a state's sovereign and proprietary acts would provide an appropriate method to distinguish between particular governmental efforts. Where the Government is conducting the business of government, certainly the widest possible access to materials should be encouraged. The dissemination of materials generated in this process is for the direct benefit of the citizenry at large and would be best served by printing through the Government Printing Office and allowing reproduction by any enterprising printer. On the other hand, certain materials appeal only to a discrete, limited sector of the population. Because the Government merely serves as a clearinghouse for this group, and because the governmental status of the product is wholly incidental to the materials themselves, the considerations are different. No longer is the Government interested in obtaining the widest possible dissemination, but merely the widest dissemination within a select group. The Government, acting like a business, should not be precluded from using the most effective method of reaching its audience, and if need be, charging a price similar to what a private concern would charge. Consequently, when the Government acts in other than a sovereign capacity, the goals of promoting the widest possible dissemination of material at the lowest possible price which lie behind the prohibition of copyright in governmental works no longer apply. Likewise, the argument that the entire public should have unlimited access to the materials does not apply with equal vigor, because the general public's benefits are indirectly achieved through the contributions of those for whose primary benefit the materials were created.

This conclusion finds support in the British practice of claiming a Crown copyright in governmental publications. While any comprehensive analysis of the Crown copyright is beyond the scope of this article, discussion elsewhere provides authority for this brief reference.<sup>208</sup> Apparently the British law permits the Crown copyright to lie dormant,<sup>209</sup> and in practice most publications issued in a sovereign capacity are dedicated to the public. These documents include most Parliamentary materials such as committee reports, debates, and acts of Parliament, as well as official papers required to be placed before that body. According to the Treasury Minutes of 1887, the

<sup>208</sup> See Berger, *supra* note 32, at 37-38; Stiefel, *supra* note 32, at 19-21.

<sup>209</sup> Stiefel, *supra* note 32, at 20, quoting 69 GREAT BRITAIN, HOUSE OF COMMONS, SESSIONAL PAPERS 1912-1913: "The rights of the Crown will not, however, lapse and should exceptional circumstances appear to justify such a course it will be possible to assert them."

Crown maintained a strict interest in maintaining proprietary control over works "of rather limited interest, . . . of the same general character as those published by private industry."<sup>210</sup>

Perhaps this practice merely recognizes explicitly a practice which has grown up in this country without much thought. It will be recalled that the earliest copyright provision was contained in the printing law and government publications were defined as materials ordered printed by the Congress.<sup>211</sup> Such congressional printing, which was usually accomplished by the Congressional Printer, now the Public Printer in the Government Printing Office, made all government documents government publications in the printing act sense, and consequently confirmed their noncopyrightability.

Even in the late 19th century executive documents were printed by the Congressional Printer and hence were government publications.<sup>212</sup> However, the great expansion of the executive departments and broad congressional grants of authority to those departments diverted some printing away from GPO.<sup>213</sup> Printing outside that office weakened the printing law basis for designating a document a government publication, despite the efforts of the Joint Committee on Printing<sup>214</sup> to compel GPO publication.

Thus by happenstance the United States appears to have stumbled into a practice which is the practical equivalent of the British solution with one slight twist. Official legislative and executive documents in both countries are not the subject of copyright; materials which are the equivalent to those produced by private enterprise are the subject of Crown copyright in Britain and often the subject of private copyright in the United States because they are produced under the terms of a special statute or by government contractors, not government em-

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<sup>210</sup> Stiefel, *supra* note 32, at 19, 20 n.50. Stiefel quotes the 1887 Treasury Minutes for the proposition that the Crown copyright would be asserted only with respect to literary or quasi literary works and charts and ordinance maps. See also Berger, *supra* note 32, at 37, which updates the British practice by noting a 1958 British Treasury circular which retains the distinction between governmental and "commercial" documents, and indicates a willingness to act as a private copyright owner with respect to the latter class, charging royalties for reproduction.

<sup>211</sup> See text accompanying notes 32-41 *supra*.

<sup>212</sup> 25 CONG. REC. 1462-63 (1893).

<sup>213</sup> See Ms. Comp. Gen. B-88494, 20 Jan. 1950 which affirmed the propriety of non-GPO publication of the results of government research. This approval was based on the broad language of the Atomic Energy Act of 1946, and the fact that a subcontractor received no *direct* compensation for the publication of the material. These broad grants of authority may be found in many acts. See, e.g., 20 U.S.C. § 2 (1970) (Office of Education).

<sup>214</sup> See Government Printing and Binding Regulations (1974) Nos. 36-1; 36-2; 38.

ployees. The British practice analyzes the situation by looking to the type of material; we look to the *author* with, in many respects, the same result.

One other comparison with the Crown copyright may be appropriate. In Britain the copyright vests in the government and it presumably may deal with it in the same manner that a private person may. Under government contracts and grants, however, the copyright vests in the contractor/author who often is required to provide the Government with a nonexclusive, royalty-free license.<sup>215</sup> Vesting the copyright in the contractor ostensibly protects his interest in developing the materials for publication and encourages him to use his best efforts to obtain the maximum distribution for the materials, because more sales produce more profit.

This procedure is, in the long run, probably no different than the British practice. Often the granting of a copyright to the contractor for his work is predicated on the condition that the copyright will be limited to a certain term, generally the time required to fulfill the requirements of the program.<sup>216</sup> This practice achieves the same object as giving the contractor a license to use the government's copyright in the material, or licensing the copyright that the contractor/producer obtained and assigned to the Government. It is possible, however, that substantial differences hinge upon the manner in which this result is effected. The current practice of limiting a contractor-obtained copyright to a number of years may be an unconstitutional derogation of the power vested in Congress<sup>217</sup> to ". . . secure for limited Times to Authors . . . the exclusive Right to their respective Writings. . . ."<sup>218</sup>

Consequently, the better practice would be to either allow the Government to assert copyright in certain of the publications it sponsors, or to permit the author to assert copyright in his name, assign his rights to the Government and then produce the material under license from the Government. The latter solution probably is superior if only because it retains present procedures by not creating a new right in the Government and by utilizing presently contemplated provisions.<sup>219</sup>

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<sup>215</sup> See 35 Fed. Reg. 7317-18 (1970) (Office of Education).

<sup>216</sup> *Id.*

<sup>217</sup> Kaplan v. Johnson, 409 F. Supp. 190 (N.D. Ill. 1976). (The failure of Congress to enact a general statute dealing with Veterans' Administration employees' rights to patents precludes the executive branch from doing so under the separation of powers doctrine.).

<sup>218</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>219</sup> See 122 CONG. REC. S2049 § 105 (S. daily ed. 1976).

## VI. CONCLUSIONS

Current congressional initiatives to revise the copyright laws will reaffirm the basic principle that materials written by officers and employees of the Government within the scope of their duties may not be copyrighted. The law will still permit governmental authors to assert private copyright in literary or other works they have created, if the work is incidental to and not required by their duties, even though the work relates to their particular position. The provisions of the current Army Regulation which interpret the copyright law as prohibiting officers or employees from asserting copyright in materials prepared as part of their implied duties is unclear and must be read in conjunction with the cases which more clearly define the types of material which may not be copyrighted. The Department of the Army should clarify its regulation to conform precisely with the judicial interpretation of section 8, and until it does, military attorneys should recognize the imprecision of its provisions and so advise their commanders and clients.

Two provisions in the proposed legislation will conform fringe areas of the governmental copyright prohibition to the theoretical basis of the common law and statutory rules. No longer will a theoretical basis exist which will allow the Government to assert common law copyright in unpublished works or to claim copyright in works which are not publications in the sense that they are not printed materials.

However, the Congress has refused to legislatively resolve the difficult issue of whether material produced under government contracts or grants can be the subject of a private copyright. Permitting documents which relate to proprietary rather than sovereign governmental functions to be copyrighted would involve no conflict with the theoretical basis underlying the prohibition of copyright in governmental publications. The current approach of the copyright act which determines the permissibility of copyrighting government-sponsored works by looking to the status of the author concentrates on an issue which is irrelevant to the reasons behind the prohibition. A better practice would be to allow contractors to obtain copyright only in works which do not relate to sovereign governmental functions. It is unlikely that any such change will be made in the copyright law, however, and government agencies will remain able to secure copyright for any reason which is satisfactory to them by procuring the work by contract rather than having it produced by governmental officers or employees.